**MAP "B"**

*Scale; 1 inch --200 feet*

**EXHIBIT 2.**

17,294

# Supreme Court of the United States.

## OCTOBER TERM, 1899.

**No. 208.**

---

THE SHOSHONE MINING COMPANY,

Appellant,

vs.

ROYAL J. RUTTER and F. W. BRADLEY,

Appellees.

---

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

---

# BRIEF OF APPELLANT.

---

## STATEMENT OF THE CASE.

---

On the 21st day of August, 1895, the Shoshone Mining Company made application for patent for the "Shoshone" lode claim, situated in the Yreka Mining District, Shoshone county, Idaho, the publication of which application was duly made, and on the 22nd day of October, 1895, Royal J. Rutter and F. W. Bradley filed their protest and adverse claim against said application for patent. The area involved in the adverse

claim is approximately shown by the plat attached to the amended complaint. (Trans. p. 29.)

On November 15, 1895, the adverse claimants filed their bill of complaint in support of said adverse claim, in the United States Circuit Court for the District of Idaho, Northern Division, on the equity side of the Court. (Trans. p. 1.)

Thereafter the applicant, the Shoshone Mining Company, demurred to the said bill upon the following grounds: (Trans. p. 6.)

I.

That a compliance has not been made in said bill with any of the requisites of rule 20 of the Equity Rules of this Court.

II.

That the defendant's residence or place of abode is not stated in said Bill.

III.

That the said Bill is deficient in certainty, in this: that it does not state under the laws of what State or under what laws the defendant is incorporated or has any legal existence.

IV.

That it appears upon the face of the Bill that the plaintiffs have an adequate remedy at law. (Trans. p. 7.)

V.

That the said plaintiffs have not in or by the said Bill, made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for, from or against this Defendant.

VI.

That the value of the subject matter of the plaintiffs' action is beneath the dignity of the Court, in that it does not show by the Bill that the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars.

VII.

Because the said Bill does not show on its face any diverse citizenship between the parties complainant and defendant.

VIII.

Because the Bill does not show on its face that the action is one arising under the constitution or laws of the United States.

Whereupon the complainant presented to the Court an amended bill of complaint. (Trans. p. 8.)

Whereupon the Court held that all except two of the said several causes of demurrer to the original complaint were cured by the amended complaint, which complainants were

permitted to file. (Trans. p. 15.) That as to the fourth, seventh and eighth causes of demurrer, the said demurrer should be overruled, to which the defendant excepted, which exception was allowed and a bill of exceptions duly settled. Trans. p. 17.)

That thereupon the defendant, the Shoshone Mining Company, demurred to the said amended bill of complaint, upon the grounds stated in the fourth, seventh and eighth causes of the first demurrer, which said demurrer was by the Court overruled, to which the defendant excepted, which exception was allowed, and the bill of exceptions was duly settled. (Trans. pp. 13, 14.)

The opinion of the Court upon both demurrers is given together on pages 15-17 of Transcript.

The defendant thereupon answered and the plaintiffs replied. The second amended complaint, which was filed on the 21st of May, 1897, (Trans. pp. 24-29) is the statement of the plaintiffs' case to which the defendant filed its answer July 8, 1896. (Trans. pp. 18-23.)

The opinion overruling the demurrer to the several complaints of the plaintiffs was filed on June 22, 1896, and was made to apply to all the demurrers and the defendant's demurrer was made to apply to all of the complaints.

It appears by the complaint (Trans. p. 25) that the plain-

tiffs and defendant are each citizens of the State of Idaho.

The complaint then alleges that on the 20th of August, 1895, the plaintiffs were the owners and in possession of the Kirby Fraction mining claim; that on the 11th of July, 1886, while the premises were vacant, unoccupied, unappropriated mineral lands, open to exploration and location by citizens of the United States, certain citizens of the United States went upon the premises and discovered a lode of rock in place bearing silver, lead and other valuable minerals, and located the same as a mining claim. It then describes the acts of location and record. (Trans. pp. 25-26.) And alleges that they have performed the necessary labor required by law during each year.

It then alleges that the defendant, the Shoshone Mining Company, in August, 1895, caused an official survey of the Shoshone claim to be made so as to overlap upon the Kirby Fraction lode claim, and upon such official survey filed application for patent in the United States Land Office, for the Shoshone claim; and that the plaintiffs, on behalf of the Kirby Fraction claim, filed their adverse in said Land Office, and this suit is brought in support of said adverse. That the plaintiff is damaged more than $10,000 by reason of the acts complained of. (Trans. p. 28.) They allege that the acts complained of wrongfully imperil, cloud and encumber their title. They pray for a decree that they are the owners of and entitled to the possession of the premises in conflict, and that

the defendant, the Shoshone Mining Company, has no title or right of possession of the said premises, or any part thereof. They ask for a restraining order and general relief. To this amended complaint the defendant, the Shoshone Mining Company, filed its answer, denying that the complainant was the owner or in possession of the ground and premises claimed; denied the location of the Kirby Fraction claim; denied the discovery of mineral thereon, as set forth in the complaint; denied the expenditure of $100 in labor, as required by law; denied that the description of the Kirby Fraction lode as given in the amended bill was within the limits and the boundaries established on the ground, or of any boundaries ever established as the Kirby Fraction lode claim. (Trans. pp. 19-20.)

The defendant then admits that it is the owner of the mining claim called the "Shoshone," and that it caused the same to be surveyed for patent, and that on the 24th day of August, 1895, it applied for patent in which it alleged that it was the owner and in the possession of the whole of the Shoshone mining claim, including the ground in controversy, and denied that the complainants, or any person through whom they claimed, had ever been in possession of any portion of the ground and premises included within the defendant's application for patent. Defendant then admits the filing of the adverse claim by plaintiffs but denies that they brought any



suit in support thereof within a period of 30 days in a *Court of competent jurisdiction.* They deny that they imperil or cloud the title of the Kirby Fraction, but admit that they gave out and alleged that the location of the Kirby Fraction was invalid and ineffectual to appropriate the same as a mining claim.

Denies that the complainants have no plain, speedy and adequate remedy at law for the alleged injuries complained of in their bill of complaint. They then especially plead forfeiture by reason of the failure to perform the annual assessment work. (Trans. p. 21.)

The defendant then affirmatively alleges the location, on the 21st of March, 1894, of the Shoshone mining claim; the conveyance by the locator to the defendant, the Shoshone Mining Company, and the performance of the annual labor thereon. That the defendant is and has, since the 26th of March, 1894, been in the continued and exclusive possession of the Shoshone mining claim, and the ground in controversy, holding and claiming the same by virtue of the location of the same as a mining claim. (Trans. pp. 22-23.)

They then interpose a special defense that the complainants had an adequate remedy at law, claiming the same benefit from said allegation as on demurrer.

It will be observed (p. 21, folio 45) that the defendant also interposes a special defense that the suit was not com-

menced in a *Court of competent jurisdiction.* These two special defenses, raising the question both as to the Federal jurisdiction and the form of the action. To this answer the complainant filed its replication. (Trans. p. 24.)

By stipulation (Trans. p. 36) this case was consolidated with the case of Shoshone Mining Company vs. Royal J. Rutter and F. W. Bradley.

To avoid a reference of the case to take the testimony, the Court consenting, the parties stipulated to take the testimony in open court, before the Judge. (Trans. p. 62, folio 132.)

The plaintiffs introduced evidence as to the location of the "Kirby Fraction" mining claim, upon which they seek to recover in this action, and which they claim was located by their predecessors in interest on the 11th of July, 1886. They then introduced deeds conveying the "Edith" and "Kirby" mining claims to the plaintiffs. No conveyances were introduced purporting to convey to the plaintiffs any interest in the "Kirby Fraction" mining claim.

It appeared by the evidence of two of the locators of the "Kirby Fraction" claim that prior to the making of said location they had located a mining claim called the "Edith" covering the ground afterward located as the "Kirby Fraction." That they had not abandoned, nor intended to abandon the "Edith" location before, or at the time, or even after the mak-

ing of the location of the "Kirby Fraction"; that they intended to claim under both locations. That they made no discovery of a mineral bearing ledge of rock in place on the "Kirby Fraction" prior to the location thereof. But the Court held that even though no discovery were made before the location, if a discovery were afterward made, the location would be validated thereby, except as against intervening rights.

The testimony of all the witnesses on behalf of both plaintiffs and defendant, clearly shows that no ledge of rock in place containing any minerals of value has ever been discovered within the "Kirby Fraction" claim, and the Court in passing upon this question says, that were it required that the evidence should remove all reasonable doubts as to such discovery that he should answer the question in the negative. (22nd Assignment of Error. Trans. p. 33, folio 71-72.

The evidence showed that defendant was in possession of the premises in controversy.

The defendant then offered in evidence the sworn statement of the plaintiff, Bradley, made by him, and filed for record in the County Recorder's office, that the annual assessment labor upon the "Kirby Fraction" claim for the years 1895 and 1896, was performed by the Bunker Hill & Sullivan Mining & Concentrating Company. The offer was made for the purpose of showing that the said Bunker Hill & Sullivan

Mining & Concentrating Company was the real owner of the claim, and that as a consequence the plaintiffs could not maintain this action. Also that if the said company was not the real owner of the claim its performance of the annual labor could not be taken advantage of by the plaintiffs in this action, no agency being shown.

The Court sustained the objection to the introduction of this testimony on all grounds. Defendant then asked both plaintiffs while on the witness stand whether or not they were the real owners of the property, and whether the Bunker Hill & Sullivan Mining & Concentrating Company was not the real owner of the property, and whether they or either of them had any interest in the property in dispute, to all of which questions objection was interposed and the objection sustained. The defendant maintained and sought to prove that the plaintiffs were "straw men" and not the real parties in interest, but was not allowed to introduce any proofs of this fact, the Court holding that it was immaterial and that said proof would constitute no defense to their right to patent the ground in controversy or maintain the action.

The defendant sought to prove by Deputy Mineral Surveyor Mr. Loring on the witness stand, that he had in making the official survey of the "Kirby Fraction" claim adopted a new point of discovery different from that upon which the

location was based. The Court held that this was immaterial. (11th Assignment of Error is based upon this ruling.)

At the close of plaintiffs' testimony, defendant moved to dismiss plaintiffs' Bill for the following reasons:

First—For the reason that this Court has no jurisdiction of the case as a Court of Equity.

Second—That the plaintiffs have failed to show that this ground was vacant, unoccupied, public mineral land, subject to location at the time of the location of the Kirby claim, but on the contrary have shown by the locators under whom they claim, that at the time the location was made, the ground was not a part of the public domain or subject to location; that it had been located as the "Edith" claim, which claim was then a valid, subsisting mining claim; that the discovery and location of the "Kirby" was within the limits and boundaries of the "Edith" location.

Third—The plaintiffs have failed to show that prior to the making of the location of the Kirby, they discovered any lode or ledge of mineral-bearing rock in place, such as the law requires, as the basis of a mining location, but on the contrary, have shown affirmatively by the testimony of the locators that they did not make such discovery.

Fourth—That if any discovery has been shown to have been made, or any ledge to have been discovered upon the

"Kirby" claim, that it was long after the location of the claim.

Fifth—That no discovery of any ledge, such as the law contemplates a mining claim should be located upon, has been made, and that such fact appears from the testimony of the plaintiffs in this case.

Sixth—That the area of ground claimed in this suit lies outside of and beyond the lines of the "Kirby" claim, as they were definitely fixed and marked upon the ground by the official survey made by Mr. Loring: That the southwest corner of the claim is extended about 300 feet beyond where it was placed, and notice was given to the world that they had drawn in this line.

The motion to dismiss plaintiffs' Bill was denied, and an exception allowed.

The defendant then introduced the notice of location of the "Shoshone" mining claim, from which notice it appears that the discovery upon which the location was based was made at a point about 1,200 feet beneath the surface of the mountain, and was reached by passing through the tunnels and excavations of an adjoining mine. That the point of discovery was not within the boundaries of any located mining claim. That it was made upon a portion of a ledge, the top or apex of which was within another location and patented to other parties. That the portion of the ledge upon which the location was made was so situated that no other location

could claim it by reason of any extra lateral rights or otherwise. That the point on the surface where the notice of the defendant's location was placed, was vacant and unoccupied mineral lands of the United States, subject to location as such upon a proper discovery of the mineral being made therein. It appeared from the testimony that while the ground may have originally been included within the surface boundaries of the "Kirby Fraction" alleged location, the lines of that claim had been so adjusted by the United States Deputy Mineral Surveyor in surveying the "Kirby Fraction" claim for patent, as to leave the point where the notice of the location of the "Shoshone" claim was posted outside of the "Kirby Fraction" lines. The Court held that this was immaterial; that the location of a mining claim could not be made upon such a discovery as was claimed for the "Shoshone"; and that no surface rights would be acquired by reason of such a discovery or a location based thereon. That if the surface ground was claimed at all it should be at some point where it would be available for the purpose of working the ledge claimed, and not on top of the mountain immediately above the point of discovery.

The defendant offered in evidence the notice of location of the "Shoshone" claim, and proof of the recording of the same; also proof of the making of the discovery of a ledge of mineral bearing rock in place therein, as above described, prior to the making of such location; and also introduced

proof of the marking of the boundaries of the claim upon the surface of the ground as described in said notice and of the performance of a large amount of development work upon said claim, and a conveyance by deed from the locator to the Shoshone Mining Company, the defendant.

The defendant then introduced evidence showing the invalidity of the location of the "Kirby Fraction" claim.

The Court took the matter under advisement on May 26, 1897, and on June 25, 1897, filed a decision in which he holds that the "Kirby Fraction" is a valid location, and prior to the "Shoshone" and is entitled to judgment for the ground in controversy and for a patent (Trans. p. 29-196), and in effect that the "Shoshone" location is invalid. No other findings of fact or conclusions of law were found by the Court than those contained in the said decision.

This case is consolidated for the purpose of appeal with the case of "The Shoshone Mining Company v. Royal J. Rutter and F. W. Bradley," for the reason that both suits involve the title of the "Kirby Fraction" and the "Shoshone" claims and the right to patent them, and the claims of both parties in each case rest substantially upon the same facts. Such questions of law and fact as pertain solely to the latter case will be considered in this brief after disposing of the first case.

## SPECIFICATION OF ERRORS.

First—That it appears upon the face of the Bill that the plaintiffs have an adequate remedy at law.

Second—That the said plaintiffs have not, in or by said Bill, made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for, from or against this defendant.

Third—Because that it does not appear that the action is one arising under the constitution or laws of the United States, or any treaty made under its authority.

Fourth—Because the Court refused to admit in evidence defendant's exhibit 4, being the affidavit of plaintiff Bradley that during the year 1895 the Bunker Hill & Sullivan Mining & Concentrating Company did the annual assessment work upon the "Kirby Fraction" claim as the owner thereof, which is in words and figures as follows:

## DEFENDANT'S EXHIBIT 4.

### PROOF OF LABOR.

State of Idaho, )
) ss.
County of Shoshone. )

---

Before me personally appeared F. W. Bradley, who, being first duly sworn, says: That during the year 1895, at least $30,000.00 has been expended for underground development work in the Bunker Hill & Sullivan group of mines, which consists of the following lode mining claims, viz:

Ollie McMillan, No Name, Sarnia, Miners' Delight, Sullivan Extension, Mabundaland, Zululand, Blue Bird, Rookery, Richmond, Offset, Kirby Fraction, Fraction, Sullivan Fraction, Bulah, Bonanza Fraction, Alla, South, Essex, Overlap, Matabeleland, Homestake, Aspen, Allie, Silver, Bought Again, Helen Marr, Sancho Fraction, Cypress, Iron Hill, East, George Arnett, Harris, Mashonaland, Butternutt, Maple, Triangle, Josie, Bullion, Miles, Grant, Stemwinder Fraction, Hemlock.

Situate in Yreka Mining District, County of Shoshone, State of Idaho. That such expenditure was made for the direct development of the said group of contiguous mining

claims at the expense of the Bunker Hill & Sullivan Mining & Concentrating Company, owner of said group of claims, for the purpose of holding said group of claims.

F. W. BRADLEY,

Subscribed and sworn to before me this 10th day of December, 1895.

M. J. SINCLAIR,

[SEAL] Notary Public.

Recorded at the request of F. W. Bradley, December 13, 1895, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder.

By L. A. DOHERTY, Deputy.

Fifth—Because the Court refused to admit in evidence defendant's exhibit 5, being the notice of assessment work on the "Kirby Fraction" claim for the year 1895, made and filed by plaintiff Bradley as manager of the Bunker Hill & Sullivan Mining & Concentrating Company, which said notice is in words and figures as follows:

---

DEFENDANT'S EXHIBIT 5.

Notice of assessment work on mining claims.

Notice is hereby given to all whom it may concern, that

the Bunker Hill & Sullivan Mining & Concentrating Company has during the year 1895 expended for underground development work in the Bunker Hill & Sullivan group of mines the sum of $30,000.00 and claims that such expenditure was made for the direct purpose of developing and holding according to law all the following and adjoining and contiguous mining claims which are worked together as one group and claimed by the Bunker Hill & Sullivan Mining & Concentrating Company:

Ollie McMillan, No Name, Sarnia, Miners' Delight, Sullivan Extension, Mabundaland, Zululand, Blue Bird, Rookery, Richmond, Offset, Kirby Fraction, Fraction, Sullivan Fraction, Spruce Fraction, Bulah, Bonanza Fraction, Alla, South, Essex, Overlap, Matabeleland, Homestake, Aspen, Allie, Silver, Bought Again, Helen Marr, Sancho Fraction, Tamarack, Cypress, Iron Hill, East, George Arnett, Harris, Mashonaland, Butternutt, Maple, Triangle, Josie, Bullion, Miles, Grant, Stemwinder Fraction, Hickory, Hemlock.

Bunker Hill & Sullivan Mining & Concentrating Company, by F. W. Bradley, Manager.

We, the undersigned, on the 11th to 14th days of De-

cember, 1895, have posted a copy of this notice on each of the above mentioned mining claims.

GEORGE A. SONNEMANN,
W. S. HARRIS,
LLEWELLYN LLEWELLYN.

Recorded at the request of F. W. Bradley, December 17, 1895, at 2 o'clock p. m.

BARRY N. HILLARD,
County Recorder.

By L. A. DOHERTY, Deputy.

Sixth—Because the Court refused to admit in evidence defendant's exhibit 3, being the affidavit of plaintiff Bradley, that during the year 1896, the Bunker Hill & Sullivan Mining & Concentrating Company did the annual assessment work upon the "Kirby Fraction" claim as the owner thereof, in words and figures as follows:

---

DEFENDANT'S EXHIBIT 3.

PROOF OF LABOR.

State of Idaho, )
) ss.
County of Shoshone. )

Before me personally appeared F. W. Bradley, who, being first duly sworn, says, that he is the agent for the Bunker

Hill & Sullivan Mining & Concentrating Company, and that during the year 1896, at least $50,000.00 has been expended for underground development work on the Bunker Hill & Sullivan group of mines which consist of the following lode mining claims:

Ollie McMillan, Miners' Delight, Zululand, Fraction, Bulah, South, Matabeleland, Allie, Helen Marr, Cypress, George Arnett, Butternutt, Josie, Grant, Hemlock, Scoffield, Whoop Up, Buckeye, B. W. Fraction, No Name, Sullivan Extension, Blue Bird, Offset, Bought Again, Tamarack, East, Mashonaland, Triangle Fraction, Sullivan Fraction, Bonanza Fraction, Essex, Homestake, Silver, Sancho Fraction, Iron Hill, Harris, Maple, Bullion, Stemwinder Fraction, Stopping, Krouger, La Crosse, W. H. Fraction, Ben Herr, Sarnia, Mabundaland, Rookery, Kirby Fraction, Spruce Fraction, Alla, Overlap, Aspen, Miles, Hickory, African Reef, Johannesburg, Summit, Stemwinder.

Situated in Yreka Mining District, Shoshone County, Idaho, and that such expenditure was made for the direct development of the said group of contiguous mining claims at the expense of the Bunker Hill & Sullivan Mining & Concentrating Company, owner of said group of claims, for the

purpose of holding all of the above mentioned lode mining claims.

F. W. BRADLEY,

Subscribed and sworn to before me this 4th day of December, 1896.

M. J. SINCLAIR,
Notary Public.

Recorded at the request of F. W. Bradley, December 7, 1896, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder.

By JOHN P. SHEEHY, Deputy.

---

Seventh—Because the Court refused to admit in evidence defendant's exhibit 2, being the notice of assessment work on the "Kirby Fraction" claim for the year 1896, made and filed by plaintiff Bradley, as manager of the Bunker Hill & Sullivan Mining & Concentrating Company, which said notice is in words and figures as follows:

DEFENDANT'S EXHIBIT 2.

Notice of assessment work on mining claims.

Notice is hereby given to all whom it may concern that

the Bunker Hill & Sullivan Mining & Concentrating Company has during the year 1896 expended for under ground development work in the Bunker Hill & Sullivan group of mines the sum of over $50,000.00, and claims that such expenditure was made for the direct purpose of developing and holding according to law all the following adjoining and contiguous mining claims which are worked together as one group and claimed by the Bunker Hill & Sullivan Mining & Concentrating Company:

Ollie McMillan, Miners' Delight, Zululand, Richmond, Fraction, South, Matabeleland, No Name, Sullivan Extention, Blue Bird, Offset, Bonanza Fraction, Essex, Homestake, Sarnia, Mabundaland, Rookery, Kirby Fraction, Alla, Overlap, Aspen, Allie, Helen Marr, Cypress, George Arnett, Butternutt, Josie, Grant, Hemlock, Scoffield, Whoop Up, Buckeye, B. W. Fraction, Silver, Sancho Fraction, Iron Hill, Harris, Maple, Bullion, Stemwinder Fraction, Stopping, Krouger, La Crosse, W. H. Fraction, Ben Herr, Bought Again, Tamarack, East, Mashonaland, Triangle Fraction, Miles, Hickory, African Reef, Johannesburg, Summit, Stemwinder.

Bunker Hill & Sullivan Mining & Concentrating Company, by F. W. Bradley, Manager.

---

Eighth—Because the Court refused to allow the defend-

ant to show by Mr. Rutter when on the witness stand, that neither Mr. Rutter nor Mr. Bradley had any interest in the "Kirby Fracton" claim, but that it belonged to the Bunker Hill & Sullivan Mining & Concentrating Company, and that they were simply allowing it to remain in the name of these individuals for such benefit as they might derive from said title so remaining during the litigation concerning the same; that Mr. Rutter has disposed of his interest to said company, and that Mr. Bradley holds the interest standing in his name for the Bunker Hill & Sullivan Mining & Concentrating Company, and that the said Bunker Hill & Sullivan Mining & Concentrating Company are the real parties in interest, and the only parties who can maintain this action.

Ninth—Because the Court refused to allow the defendant to show on cross-examination of complainant Bradley that he was not the real owner of any interest in the premises sued for. But that the Bunker Hill & Sullivan Mining & Concentrating Company was the real owner of said premises.

Tenth—Because the Court refused to allow the defendant's Counsel to inquire of the said Bradley while upon the witness stand, as to whether or not all of the work that had been done upon the "Kirby Fraction" claim for the years 1894, 1895 and 1896, had not been done by the Bunker Hill & Sullivan Mining & Concentrating Company, and paid for by them, and whether or not he did not file the sworn state-

ment relative to the doing of said work as shown by defendant's exhibits 2, 3, 4 and 5.

Eleventh—Because the evidence shows that the "Kirby Fraction" mining claim was not a valid location:

1. Because the ground had already been located as the "Edith" mining claim.

2. Because no discovery such as is required by law was made upon the "Kirby Fraction" prior to the location thereof.

3. Because no valid discovery was made upon the "Kirby Fraction" claim.

Twelfth—To the decision of the Court that the discovery of the ledge within the ground located, after such location, would validate the location made without, or before a discovery.

Thirteenth—Because the evidence shows that the boundaries of the "Kirby Fraction" claim as marked upon the ground, were not as described in the Bill of Complaint, or in the adverse claim filed in the United States land office.

Fourteenth—Because the evidence shows that the "Shoshone" mining claim was a valid location and entitled to recover in this action, and to receive a patent for the land claimed in its application for patent.

Fifteenth—Because the evidence showed that the loca-

tion of the "Shoshone" claim was made upon a ledge of mineral bearing rock in place, upon the vacant and unappropriated public domain of the United States, and said location was good as against every person, and entitled the owners thereof to a patent from the United States.

Sixteenth—Because the evidence showed that no other mining claim located upon the apex of said ledge or otherwise was entitled to said lode, or any part thereof, as against the "Shoshone" mining claim.

Seventeenth—Because the evidence showed that the defendant was entitled to recover in this action.

Eighteenth—To the decision of the Court wherein it holds as follows:

"Is the place of the posting of the notice of an underground discovery important?"

"It seems in this case to have been so regarded, and the locator of the "Shoshone" attempted to post his notice upon the surface marked on the plat "Shoshone Disc.," perpendicularly over the place of the underground discovery.

"The 'Kirby' as originally located, is indicated by the lines 1, 2, 3, 4 and 5. Some time after its location it was bonded to certain parties and an official survey for patent was made of it in the form indicated by the lines 1, 2, 6 and 7, which did not include the place where the "Shoshone" notice

was posted, but as now surveyed and indicated by the lines 3, 5, 8 and 9, such place is included. The defendant company insists that the "Shoshone" notice was posted in view of such first survey and so that it might not be within the limits of any other claim, and that the "Kirby" should be bound by such first survey. There can be no doubt that if the owners of the "Kirby" authorized such survey they could not subsequently so change it as to interfere with intervening attaching rights. It is, however, claimed by the "Kirby" owners that such first survey was unauthorized by them, and was procured alone upon the motion of the party to whom they had bonded the claim.

"As I view the law, these questions are not material. In the first place, it is questionable what surface rights accrue to the discoverer of a ledge under the tunnel site law, that statute—Sec. 2323—only grants "where a tunnel is run for the development of a vein or lode, or for the discovery of mines . . . . the right of possession of all veins . . not previously known to exist, discovered in such tunnel to the same extent as if discovered from the surface."

"This gives a right only to the vein discovered, not previously known to exist. It grants no surface rights nor other vein than that discovered, but to this, the same rights in extent as if discovered, from the surface

"I think the only reference in the law to surface rights is

that in Sec. 2322, which treats alone of locations made of ledges discovered upon the surface, whereby a certain surface is granted, together with every ledge whose apex is within such surface. To apply all the rights granted by this section to a discovery under Sec. 2323 would be a most liberal construction. It would be granting to the locater all the ledges apexing within the surface location he might make,even when the apex of the ledge he actually discovered far under ground might be without the boundaries of the surface located.

"Whatever should be the construction of the law it has made no direct provisions for surface rights for ledges discovered under the tunnel site law, yet it is reasonable to presume that necessary surface rights are implied. But should they not be where they can be of utility? The original idea of surface rights was only for the purpose of working the vein and only the vein discovered. Surface rights on the top of a hill of a vein discovered far under ground can be of no practical value to such vein.

"Again, the law makes on provision for the posting of any notice of a ledge discovered under Sec. 2323, but it may be fairly presumed that some notice to the world, aside from the tunnel site location notice, should be made, that it may be known where in the tunnel the ledge is situated, and in what direction, and how far from the place of discovery it is claim-

ed; but these purposes are more fully answered by placing such notice at the mouth of the tunnel where prospectors are more likely to go to ascertain what rights could be claimed through the tunnel, and where surface rights could be made useful. Certainly it serves no useful purpose to place such notice perpendicularly over the discovery, for there is not the least probability that this is on or over the apex which is most likely, in cases of deep discovery, to be beyond the boundaries of the surface so located, and a notice so posted is likely rather to mislead than direct another prospector, who may find the apex beyond such surface limits.

"Certainly, under the congressional mining act the place of posting the notice of even a location based upon a surface discovery is not important. The apex of the ledge must be within the surface claimed, while independent of local laws, the notice might be elsewhere, if sufficiently near and sufficiently definite in its discription to define the discovery and the claim. The place of the ledge discovery, and not that of the posting of the notice, is the more important question. This was in effect long since held in the case of Phillpots v. Blasdel, 8 Nev. But whatever the law may be, modified as it is by local laws, as to the place of posting the notice of a surface discovery, I think the notice of a discovery made far under ground may be posted at any point upon the surface which is likely to give notice of the lo-

cation of the ledge discovered, and that it is immaterial whether the place of posting is within the limits of another claim or not. It does not appear from the pleadings that the Shoshone claim was located in pursuance of Sec. 2323, but it does appear that the alleged discovery is far under ground and that the notice was posted immediately over the place,not to mark where the apex of the ledge is but where underground the discovery was made, and I hold that as to the posting of the 'Shoshone' notice it is valid, even within the limits of another valid claim."

Nineteenth—The decision of the Court wherein it holds as follows:

"Can a location be so based upon the alleged discovery of a ledge in its subterranean depths, which has been previously discovered and located upon the surface, is an important question affecting the validity of the 'Shoshone' claim.

"It is admitted that the ledge upon which the 'Shoshone' is located is the same which apexes in prior locations to-wit: The Bunker Hill, Stemwinder, Emma, Last Chance and Tyler, and that the apex of the ledge runs through these claims as indicated by the line of flags, numbered 3 to 10, inclusive, upon the plat. There can be no doubt that the entire apex of that part of the ledge, upon which the 'Shoshone' is located, is covered by these several claims, yet it so happens, either under the absurdities of the mining law or its erroneous interpre-

tation, that while the entire apex of a ledge may be covered by several claims they may not altogether hold all portions of the ledge in its underground depths. If it were clear by the evidence in this case that the several claims, which have the apex of the ledge, can follow it in its depths under the 'Shoshone' it would be equally clear that the 'Shoshone' would be invalid, but it is argued that some of these claims have no extra-lateral rights. It is settled that when a claim is so located that the apex crosses the side lines they become end lines, between whose planes the ledge can be followed, but it is also argued here that when these planes are more along the course of than across the ledge, that the ledge cannot be followed beyond the boundaries of the claim. It is true as suggested by counsel, that this court once instructed a Jury (but with much doubt) that a ledge could not be followed more on its course than on its dip, and it does seem absurd when the law says ledges may be followed on their "depths," for the courts instead to say that they may be followed along their "course." (But the Court of Appeals did not by word affirm this instruction of this Court, nor has that rule been supported by any Court save a *nisi prius* court in Utah Territory. It would seem that the only logical conclusion of the holdings of the courts that ledges must be followed between the planes of the lines they cross is that they may be followed indefinitely between those planes prolonged; for to say that when such following would be more along the course than on the dip you

must stop at the side boundary line of the claim, is making a new law which Congress never authorized. If there is any one right specially granted by congress it is to follow the ledge indefinitely on its depths. which the miner has always claimed and done, only he followed it on its dip, which to some extent the Courts have unfortunately felt constrained, under their views of the law. to modify.

"While I am inclined to think that the 'Stemwinder' and the other claims named have such extra-lateral rights as will include this vein under the 'Shoshone,' I do not think that question can be determined in this case without further testimony, but it may be said that if there is any portion of the ledge within the 'Shoshone,' which is not covered by their extra-lateral rights it will belong to the 'Shoshone' if this latter claim is not void as against the 'Kirby.' "

Twentieth—The decision of the Court wherein it holds as follows:

"Is the 'Kirby' a valid location?"

"It is said that it is void because re-located before the 'Edith' location—which was substantially the same ground. —had become forfeited or abandoned. Of course it is clear that ground once located cannot be re-located by other parties until forfeiture or abandonment of the first location. Citations on this question are unnecessary.

"It has been said that the locators of the 'Edith' did not intend to abandon it before locating the 'Kirby.' The fact is that they did not intend to abandon the ground but only the name. The same parties who located the 'Edith' concluded to add to their ground as first located, and did so by changing their lines and locating as the 'Kirby.' I cannot doubt the right of locators to change their lines as well as the names of their claims as often as they desire, so long as they do not interfere with other rights. Any change in the name of the claim or its boundaries by the owners thereof, certainly, is good from the day when the change is made, if no other rights have intervened and the location or re-location, if it may be so termed, of this ground as the 'Kirby' is good from the day of such location.

"That subsequently, deeds were made by the parties of the 'Edith' does not prove that they considered that both the 'Edith' and 'Kirby' were in existence, but this only shows that some over-cautious attorney perhaps, or whoever may have so advised, had an unnecessary thing done, as a matter of precaution. It is not the name but the ground that is conveyed. The name only designates or identifies the ground; it may be conveyed by metes and bounds as effectively as by a name, and a conveyance by any name conveys the ground, though it may be known by many names."

Twenty-first—The decision of the Court wherein it holds as follows:

"Has the 'Kirby' a ledge?"

"Were it required that the evidence should remove all reasonable doubt, I should answer this question in the negative, but under the liberal rule that prevails as to the constitution of a ledge within the law, I think the preponderance of evidence is in favor of such a discovery. It does, however, sometimes appear that the rule that a ledge within the law is that "which the miner would follow with the hope of finding ore" is often carried so far as to lead to a perversion of the intent of the law. It results that almost any kind of a crevice filled with matter different from the general country rock is held a sufficient ledge upon which to base a location, and as a result all mining countries are plastered over with locations, as worthless as the lava beds of this great interior basin."

Twenty-second—The decision of the Court wherein it holds as follows:

"Just when this discovery was made, I have not taken time to determine from the testimony, except that it was before the location of the 'Shoshone,' which, under the weight of authority, is considered sufficient. While I personally feel that any location of a mining claim made before the discovery of a vein or lode within its limits should be held void, *ab initio*,

such opinion must yield to what is deemed the preponderance of authority. Certainly it is not claimed here that the location of a claim without the discovery of a ledge is valid prior to such discovery, or is valid against another valid location made."

Twenty-third—The decision of the Court wherein it holds as follows:

"It seems altogether probable that whatever ledge the plaintiffs have is but a spur or a part of the main ledge passing through the other claims named, the apex wherein is indicated as above stated, but until it descends and becomes a part of such ledge the plaintiffs are entitled to it.

"It has also been suggested that thus far the plaintiffs' ledge has not been proven a valuable one—that is not necessary—if it is sufficient in the beginning to justify a location, which I have reluctantly held, it is sufficient for all time, even if it never becomes valuable."

Twenty-fourth—The decision of the Court wherein it holds as follows:

"The whole case considered, it must be held that the 'Kirby' is a valid location and prior to the 'Shoshone' and that the plaintiffs are entitled to judgment therefor against the defendant for a patent to the ground in dispute between the parties and to their costs, and it is ordered accordingly."

Twenty-fifth—The failure of the Court to make general or special findings of fact, unmixed with discussion of questions of the law and testimony.

---

## ARGUMENT.

---

### FEDERAL JURISDICTION.

The parties plaintiff and defendant are all citizens and residents of the state of Idaho. It follows that if the Circuit Courts of the United States have jurisdiction of the cause it must be because of the character of the question involved.

The presumption is that a cause is without the jurisdiction of the Circuit Court, unless the contrary affirmatively appears.

Peper v. Fordyce, 119 U. S., 469.
Grace v. American Central Ins. Co., 109 U. S., 283.
Turner v. The Bank of North America, 4 Dall., 8.
Ex Parte Smith, 94 U. S., 455.
Robertson v. Cease, 97 U. S., 646.

**The United States Circuit Courts are courts of limited jurisdiction, and it is an inflexible rule that it cannot be exercised by consent.**

R. R. Co. v. Swan, 111 U. S., 379.
McCormick v. Sullivant. 10 Wheat, 192.
Kempe v. Kennedy, 5 Cranch, 173.
Turner v. Bank of North America, 4 Dall, 330.

"Where the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear at the outset from the declaration or the bill of the party suing, that the suit is of that character. In other words, it must appear in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court upon demurrer or motion, or upon its own inspection of the pleadings, must dismiss the suit just as it would remand to the State Court a suit which the record at the time of removal failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend; and if so retained the want of jurisdiction at the commencement of the suit is not cured

by an answer or plea which may suggest a question of that kind."

Metcalf v. Watertown, 123 U. S., 586.
Mining Co. v. Turck, 150 U. S., 138.
Press Pub. Co. v. Monroe, 164 U. S., 105.
Muse v. Arlington Hotel Co., 18 Sup. Ct. Reporter, 111.

In the case of Butler v. Shafer, 67 Fed., 161, involving a contention between a party claiming the right to make homestead entry upon a quarter section of land in Umatilla County, Oregon, and a party who was in possession of said quarter section, claiming the right to locate it as railroad land under an act of Congress, Judge Gilbert holds that because the complaint does not show that a dispute exists as to the meaning of the homestead laws, or of the act of Congress of Sept. 29, 1890, that "It is not shown that the complainant contends for one construction of a law of the United States and the defendants for another. It does not follow from any of the averments of the bill that the court will be required to give interpretation to said laws or to said act, or to any of the terms thereof. The substance of the bill is that the complainant has duly entered land under the homestead laws and is entitled to the possession thereof, and that the defendants are in possession of the same, claiming right of possession under the act of September 29, 1890, and that

their possession is wrongful, for the reason that they are not within the description of those whose rights are conserved by the provisions of the third section of the act. That is to say the defendants had no deed, written contract or license from the railroad company and they never were actual settlers upon the land. The trial of these questions involves only an investigation of the facts. It is contended by the complainant that the court will be called upon to decide what is the nature of the settlement upon railroad lands which is intended to be protected by the act. This does not appear from the allegations of the bill. On the contrary, the statement of the facts distinctly negatives such a conclusion. If it is true that the defendants are not in privity with the railroad company by deed, contract or license, and were not settlers upon the land, but resided elsewhere, the conclusion follows that their possession is without right; but in arriving at that conclusion there is not necessarily involved a construction of the language of the act. In order that the court may have jurisdiction, it is essential not that the complainant shall state that a Federal question exists, or that it will become necessary to construe a law of the United States, but that he shall state facts from which the court may see that such a question will be presented."

It cannot be maintained that any federal question is presented for determination by the bill itself, or that any con-

troverted facts or legal propositions of a federal character are therein set forth, upon which the Court might be called upon to pass its judgment. The only grounds upon which the jurisdiction of this court can be invoked in this class of actions are, that it is a suit brought under the provisions of Section 2326 of the Revised Statutes of the United States, and is within the rule laid down in the case of Frank G. & S. M. Co. v. Larimer M. & S. Co., 8 Federal, 724, and in the case of Cheeseman v. Shreve, 37 Federal, 36, and in the case of Strasburger v. Beecher, 44 Federal, 209, and lastly in the case of Burke v. The Bunker Hill Co., in the 46 Federal, 644, a decision rendered by the late Judge Sawyer, sitting in the District of Idaho.

In the case last cited we urged the jurisdiction of the Federal Courts in suits brought under Section 2326, and were sustained in our contention; but an examination of the opinion will show that it was a case transferred from the Territorial Courts of Idaho to the United States Circuit Court, upon the admission of Idaho as a State, and that the jurisdictional allegations were stated in the petition for removal; but this statement was considered by the Court as having the same effect as though it had been the statement of the Federal question in the plaintiff's original bill filed in the Territorial Court, upon the principle that the plaintiff could not be held to have been required to conform to the rules of the Federal Court in pleading in the Territorial Court, and the right of

removal being given by the Admission Act to cases which might have been brought in the Federal Court had Idaho been a state, the party seeking to remove the case to the United States Court, were entitled to supply the jurisdictional allegations in his petition, and in that case the Federal question was fully stated therein. Since the decision of the cases at circuit above cited the Supreme Court of the United States has had occasion to consider the question, in the case of Bushnell v. Crook Min. & Smelt. Co., thirteenth Supreme Court Reporter, page 771, 148 U. S., 688. In the syllabus of that case in the Reporter it is stated as follows:

"A suit in the State Court to try the right of possession of a mining claim and the right to a patent therefor, although it is brought in accordance with the Revised Statutes, Section 2326, does not necessarily involve a Federal question, so as to give a right of appeal to the United States Supreme Court."

The Court states in the decision that it was an action brought in support of an adverse claim under the provisions of Section 2326 of the Revised Statutes of the United States, and while several other questions are decided, upon some of which the plaintiff in error invoked the jurisdiction of the Supreme Court, yet the principal ground upon which they invoked the jurisdction, was that it was an action arising under the laws of the United States and especially under the

act of Congress of May 10, 1872. The Supreme Court in disposing of this question says:

"The decision of the Supreme Court of Colorado, in no way brought into question the validity or even construction of any federal statute and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the federal statute. It was said by the Chief Justice in Cook Co. v. Calumet Canal Co., 138 U. S., 635-653: 'The validity of a statute is not drawn in question every time rights claimed under such statutes are controverted, nor is the validity of an authority, every time an act done by such authority is disputed.' "

There can be no question but that this decision in effect overrules the *doctrine* laid down in the several decisions of the Circuit Court on this question.

In the case of Burke v. The Bunker Hill Co., 46 Federal Reporter, 644, which was not a question of the original jurisdiction of the Circuit Court based on the sufficiency of the Bill, but was a case coming into this court under the act admitting Idaho as a state, the Federal question showing the contention regarding the interpretation and application of the act of Congress was set forth at length in the affidavit, and formed a part of the request for removal, and Judge Sawyer in rendering his opinion sets out that contention at length and gives it great weight in determining the question. But

in the case at bar, no Federal question is stated in the bill of complaint—no contention as to the construction of the law is herein set forth or intimated, nor is it alleged that there will be any contention, but only the question of fact involved, viz: Did the plaintiff or defendant, or their grantors, first make a valid location of the mining claim in controversy.

This is not a Federal question. Its decision does not necessarily turn upon the interpretation of any statute. The acts of location are clearly defined. The law requires that the locator shall be a citizen, or have declared his intention to become such. That he shall make a discovery of a ledge of valuable mineral bearing rock in place. That he shall mark his claim upon the ground so that its boundaries can be readily traced, and that where he makes a record of his location, that record shall contain certain statements. Whether or not these things are done is a question of fact to be determined by the jury, as is provided in the act of March 3, 1881. If he proves them he is entitled to a patent, if he fails to do so his application will be denied.

Judge Gilbert, presiding in the Circuit Court of Appeals in the Ninth Circuit, dissented from the judgment of the Court here appealed from on this question, and his dissenting opinion will be found in the 87 Federal Reporter, at page 808. He concludes that no question of Federal cognizance is presented by the plaintiff's bill, and that there being no

diverse citizenship or other jurisdictional ground upon which the Circuit Court might take jurisdiction of the case, it should have been dismissed, upon the authorities heretofore cited.

The United States Circuit Court has not jurisdiction of this action, either because of diverse citizenship of the parties or because of the character of the questions involved therein.

---

## EQUITY JURISDICTION.

The first question that presents itself for our consideration in all actions on the Equity side of this Court, is that of the jurisdiction of the Court to entertain such action. By the Constitution of the United States and by the Act of Congress organizing Federal Courts and defining and investing the jurisdiction of these tribunals, the distinction between common law and Equity jurisdiction has been explicitly declared and carefully defined and established. Thus in section 2 of article 3 of the Constitution, it is declared that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States," etc.

In the Act of Congress "to establish the judiciary of the United States" this distribution of law and equity appears and is frequently referred to, and by the 16th section of the

Judiciary act, which is Section 723 of the Revised Statutes of the United States, it is provided that:

"Suits in Equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

The constitution has declared in the third article that the judiciary power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority, &c. It is well known that in civil suits, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases. When, therefore, we find that the 7th amendment to the Constitution requires "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," the natural conclusion is that the distinction was present in the minds of the framers of the amendment. By *common law* they meant what the Constitution denominated in the 3rd article law, not merely suits which the common law recognizes among its old and settled proceedings, but suits in which *legal rights* were to be ascertained and determined in contradistinction to those where

equitable rights alone were recognized and equitable remedies administered.

Parsons v. Bedford et al., 3 Peters, 446.
Fenn v. Holme, 21 Howard, 486.
Strother v. Lucas, 6 Peters, 768.

The first assignment of error is based on the demurrer to the plaintiffs' amended bill, "That it appears on the face of the bill that the plaintiff has an adequate remedy at law."

The bill alleges that the plaintiffs are the owners of the premises sought to be recovered and that they are in possession of the same, that the defendant has filed its application for patent in the United States Land Office (this is really the original pleading in the controversy over the title to this mining ground, Wolverton v. Uichols, 119 U. S., 488). The complaint then alleges "that in and by said application for "patent, "the defendant sets up and wrongfully alleges that it was the "owner *and in possession* of the whole of the 'Shoshone' min- "ing claim, inclusive of the premises sued for . . . and "of the lode therein."

Thus we find in the bill that both parties claim to be in possession. The proofs at the trial showed both parties to be in possession. There is no allegation in the complaint that the defendant is not in possession or that its allegation in the application for patent that it is in possession is not true.

The possession, where possession is material to maintain the jurisdiction of a U. S. Court of Equity in an action to quiet title must be complete; partial possession is not sufficient.

Northern Pacific R. Co. v. Amacker, 46 Fed., 233.
Northern Pacific R. Co. v. Cannon, 46 Fed., 224.

In considering the title to a mining claim, in a proceeding for a patent, the question of possession is immaterial. Title does not flow from possession, but must rest on a valid location.

Belk v. Meagher, 104 U. S., 279.

But this is a special proceeding under the provisions of Section 2326, U. S. Revised Statutes, and may be said to be neither law nor equity. It must be conceded, however, that the Statutes of Idaho make adequate provisions under Chapter 3, Title 10, of the Revised Statutes, for the determination of this class of controversy.

Section 4538 in said chapter provides, "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim."

Under Section 16 Revised Statutes of Idaho, mining claims are real estate.

The Supreme Court of Idaho, in interpreting this Statute in Burke v. McDonald, 13 Pacific Reporter, 351, says: "We understand that an action to determine the right of possession as authorized by this act is in this Territory an action at law. If so the appellants were entitled to a jury and the court erred in holding the case was a suit in Equity and in denying the right to a jury trial."

The law of Idaho on this subject remains unchanged since this decision.

This interpretation of the Statute of Idaho by the Supreme Court of that State is conclusive and binding.

Duncan v. McCall, 139 U. S., 449.
Miller v. Anderson, 150 U. S., 132.
Morley v. Lake Shore & M. S. R. Co., 146 U. S., 162.

The decision of the State Supreme Court as to the form of action maintainable under its Statutes, is binding on the United States Supreme Court.

Wood v. Brady, 150 U. S., 18.
Lowndes v. Huntington, 153 U. S., 1.

The principle upon which Courts of Equity assume jurisdiction is that there is no adequate remedy at law. This does not necessarily mean that there is no adequate remedy at law in some particular court, but it must appear that there was

no such remedy in any court available to the party, in which his legal rights could be adjudicated and determined. It will not be questioned but that the State Courts of Idaho had jurisdiction to determine actions brought in support of an adverse claim, nor will it be contended that the Courts of Idaho could not determine this question on the law side of such courts, or that under the decision of the Supreme Court of Idaho in the case of Burke v. McDonald, 13th Pac. Reporter, 351, interpreting the law of that state, such actions would be at law and the parties entitled to a jury trial. In view of these facts, can a party seek to avoid a trial of the controversies in an action at law before a jury, in the State Court, and bring his action in the Courts of Equity of the United States, and claim that he does so because that under the laws of the United States, and the rules of its courts, a party cannot maintain an action at law therein to determine the title to real property of which he is in possession and that therefore such action is on the Equity side of the Court?

I think that the rule is, that a court of Equity will not assume jurisdiction of a controversy, if the party has any adequate remedy at law in any court competent to determine the issue.

In Federal Courts, both because of the defendant's Constitutional right to a trial by jury, and because of the prohibition of the Act of Congress to pursue the remedy in law cases

in a Court of Equity, suits not of an equitable cognizance are strictly confined to the law side of the Court.

Daniels Chan. Prac. 6th Ed. p. 1066.
Scott v. Neely, 140 U. S., 106.
Lewis v. Cocks, 23 Wall., 470.
Killian v. Ebbinghaus, 110 U. S., 573.
Buzard v. Houston, 119 U. S., 351.

The case of Perego v. Dodge, 163 U. S., 160, is relied on as authority for the position assumed by respondent that where the plaintiff is in possession the action against one setting up an adverse claim will be in Equity, but that case turned, so far as the question as to the form of action was involved, upon the fact that the appellant had himself chosen the form of action and could not therefore be heard to demur to his own complaint or to object to the jurisdiction to which he had appealed after it had decided adversely to him. The expression found in the opinion on page 165 is suggestive of the rule in the instance cited under the statutes of Utah. It must be borne in mind that the case of Perego v. Dodge was not a case in which the original jurisdiction of a Circuit Court of the United States was involved, but only a question of the jurisdiction of a Territorial Court of Utah regulated by the Legislative enactments of that Territory.

Ely v. New Mexico &c. R. R. Co., 129 U. S., 292.

The prohibition of the sixteenth section of the Judiciary Act of 1789, 1 Stat. 82, Ch. 20, as incorporated in the Revised Statutes of the United States, Sec. 723, did not apply to the Territorial Courts of Utah. The question of the original jurisdiction might be one of selection by the plaintiff as between law and equity under the Statutes of Utah in the Territorial Court, but it is not determined by the choice of the plaintiff in selecting his form of action in the Courts of the United States. The question in those courts is to be determined by the rules of law and of the Courts, and the test to be applied is stated in the case of Hipp v. Babin, 19 Howard, 271, to be "That whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment, which affords a plain, adequate and complete remedy without the aid of a Court of Equity the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

Parker v. Winnipiseogee L. C. Co., 2nd Black, 545
Grand Chute v. Winegar, 15 Wall., 373.
Lewis v. Cocks, 23 Wall., 466.

In support of our contention that the question of who is in actual possession of the mining claim in controversy has not controlled the form of the actions brought in the United States Courts under Section 2326 of the Revised Statutes of the United States in the past, I call attention to the records

of cases of this class which have been decided by those Courts.

I have carefully examined all of the cases that have been considered and decided by the Supreme Court of the United States brought in support of adverse claims under Section 2326 of the Revised Statutes of the United States. And with the exception of O'Reilly v. Campbell, appealed from Utah and reported in the 116 U. S., 418; Chambers v. Harrington, appealed from Utah, reported in the 111 U. S., 350, and Eilers v. Boatman, appealed from Utah and reported in the 111 U. S., 356, every case has been an action at law. The Supreme Court of the United States has therefore found that a court of law, to use their own language: "Is competent to take cognizance of the right and has the power to proceed to judgment, which affords a plain, adequate and complete remedy without the aid of a Court of Equity," and this, regardless of the question of the possession of the plaintiff.

From an examination of these Utah cases, in the report of the same in the Territorial Supreme Court, it will appear that they were not suits in Equity. Harrington v. Chambers, was a statutory action under the law of Utah and was referred to P. L. Williams, under a stipulation between counsel, to take the testimony and report findings of fact and conclusions of law, and the referee made such findings of fact and conclusions of law and the case was heard in the Territorial Supreme Court and in the United States Supreme Court,

upon such findings and conclusions. In the Territory of Utah at the time of the trial of these cases there was no United States Court in which they could have been tried. They were tried in the Territorial Court under the rules of procedure established by Territorial Statute, in which the distinction between actions at law and in Equity was abolished, and the cases were tried without a jury by agreement of counsel. The Supreme Court of Utah makes this perfectly plain in Houtz v. Gisborn, 1 Utah, 173, where they say that "under Utah code there is no such thing as a chancery proceeding separate and distinct from a legal proceeding." And thus under the provisions of the Act of Congress of April 7, 1874, entitled, "An Act concerning the practice in the Territorial Courts and appeal therefrom," which especially recognized the right of the Territorial Legislature to abolish the distinction between Courts of Law and Equity, and to mingle such jurisdiction, and providing that the review of the judgment of the Supreme Court of the Territories should be by writ of error where cases were tried by jury, and by appeal where the cases were tried without a jury, these cases came into the Supreme Court of the United States on appeal, thus making them appear on the face of the record to have been on the Equity side of the Court below, but an examination of the cases as reported in the Court below will disclose the fact that they were not suits in Equity, but were tried under the Territorial Act abolishing the distinction between the Courts of Law and

Equity, and were brought as special proceedings under which the right of trial by jury was preserved by the terms of Section 1 of said Act of Congress, which right the parties might have demanded, but in these three cases appealed from Utah the right was waived and thus the cases went in by appeal instead of writ of error.

This leaves the record of the United States Supreme Court absolutely clear on this question between equitable and legal jurisdiction of suits of this kind. No suit in Equity brought in support of Section 2326 of the Revised Statutes of the United States has ever been before, or passed upon by the Supreme Court of the United States.

Jackson v. Roby, 109 U. S., 440.
Richmond Min. Co. v. Rose, 114 U. S., 576.
Gwillim v. Donnellan, 115 U. S., 45.
Hoyt v. Russell, 117 U. S., 401.
Manuel v. Wulff, 152 U. S., 505.
Larkin v. Upton, 144 U. S., 19.
Wolverton v. Nichols, 119 U. S., 485.
Kendall v. San Juan S. M. Co., 144 U. S., 658.

There are but two cases reported in the Federal reports which were brought on the Equity side of the Court, viz: "The case of Doe v. Waterloo Min. Co., 43 Fed., 219, and Preston v. Hunter, 67 Federal, 996, unless the suit of the

Montana Cent. v. Migeon, reported in the 68 Fed., 811, may be so termed. The record does not disclose the nature of the action, only that it was tried by a court without a jury. The cases of Doe v. The Waterloo and Prestion v. Hunter have both been affirmed in the Circuit Court of Appeals of the Ninth Circuit, but the question of the right to bring suit on the Equity side of the Court was not considered by that Court in either case. The question does not appear to have been raised so far as the record shows in any of these cases, except in Doe v. The Waterloo before the Circuit Judge, and no appeal appears to have been taken from his ruling thereon.

Courts of Law and Courts of Equity are not Courts of concurrent jurisdiction. Whenever a Court of Law is competent to take cognizance of the right and has power to proceed to judgment, which affords a plain, adequate and complete remedy, without the aid of a Court of Equity, a Court of Equity can have no jurisdiction. If the Court of Law did not possess the power and was not competent to dispose of these questions, how is it that in all of these actions at law, brought for the purpose of determining such adverse claims, which have been decided by the Supreme Court of the United States, no difficulty has been experienced as to the competency or adequacy of the Court to grant the relief contemplated by Section 2326 of the Revised Statutes? In some of these actions, which have been thus passed upon, the plaintiff

has been in possession and in others the defendant has been in possession. The actions have been treated as special proceedings under the statute, and the question of possession has been passed over as immaterial, so far as determining the form of action.

Every adverse suit that has been tried in the United States Circuit Court in the District of Colorado has been on the law side of the Court.

So far as the form of action is concerned, it makes no difference who is in or out of possession. The proceeding is simply to determine which party, if either, is entitled to a patent, and in such cases, where the claim is asserted under a location, actual possession is not a material question.

Burke v. McDonald, 13 Pac., 351.

Manning v. Strehlow, 18 Pac., 627.

In the case of Lee Doon v. Tesh, 8 Pac., 622, the Supreme Court of California in considering a case brought under this Act of Congress, says:

"The action is not brought to recover possession of the property or damages for a trespass thereon, or to quiet title thereto, but is a special action to determine the right of possession preliminary to purchase from the United States."

In Steel v. G. & S. Min. Co., 18 Nev., page 87, Hawley,

Chief Justice, says, in considering the same question:

"These actions may be brought by the plaintiff, whether he is in or out of possession of the mining ground in controversy and the only sensible construction of the law is, that each party must prove his claim to the premises in dispute and that the better claim must prevail." Citing Golden Fleece Co. v. Cable Co., 12 Nev., 321. This was an action at law.

The law side of the United States Circuit Court was competent to take jurisdiction of the case at bar and to dispose of it. Are there any features of this case which distinguish it from that of Wolverton v. Nichols, and the many other "adverse suits" brought under Section 2326, in which Courts of Law did dispose of the question "of the right of possession," and determine which party was entitled to a United States patent? We are forced to the conclusion that a Court of Law is competent to dispose of the issues in this class of cases, the United States Supreme Court having repeatedly recognized the sufficiency of the Courts of Law, both state and national, to dispose of such cases.

Let us examine the Bill for a moment. The allegations are, that they own a mining claim, which under the laws of Idaho is real estate. That their title to it is a legal title. The Court will take notice of the fact that this legal title can be established only by proof the performance of the acts re-

quired by the Act of Congress, viz: The acts of location, recording, etc. There is nothing in connection with the establishment of this kind of title that calls for the aid or interposition of Equity. The object of this action is to establish the existence of a title, not to quiet an established title. If the plaintiff establishes such title, that is the end of the case, and he is entitled to patent. If he fails to establish it, Equity could not help hm. The title is legal; the proofs to support it are of a legal nature also. He alleges that the defendants have done or are doing certain acts which cloud his title, but he alleges the nature and character of those acts, and from an inspection of them we find that they are not such acts as constitute a cloud upon title, but involve a contest for title under the Statute. The Court, in Belk v. Meagher, 104 U. S., holds that title comes from a valid location only. A compliance with the law regulating the location of a mining claim consists in the performance of certain acts. If the party performs those acts and is a qualified locator, he has title—legal title; not an equitable title. And the provision of the Statute of the United States, that no possessory action between individuals in the Courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title of the land was in the United States, but that each case should be adjudicated by the law of possession does not affect this rule. This would seem to settle beyond all controversy the character of the title held by the locator. If they

relied upon equitable title, the Courts of Equity would be open to them. When they rely upon a legal title it must be determined in the Courts of Law.

It is held in Lewis v. Cocks, 23 Wall., 466, that if the Courts upon looking at the proofs find none at all of the matters which would make a proper case for Equity, it would be the duty of the Court to recognize the fact, and give it effect, though not raised by the pleading nor suggested by counsel. To the same effect is Oelrichs v. Spain, 15 Wall., 211.

---

## "KIRBY" GROUND NOT SUBJECT TO LOCATION.

It is claimed that on the 11th day of July, 1886, the ground covered by this location was vacant and unoccupied mineral lands of the United States subject to location. The first witness that plaintiffs placed on the stand with reference to the "Kirby Fraction" location, was Jacob Johns, one of the locators. He testified both on direct and cross examination, that at the time of the location of the "Kirby Fraction" claim the ground had already been located as the "Edith" mining claim, and that the said "Edith" location had not been abandoned. He says in his testimony at page 14, "We located one claim over the top of the other." At page 20 of his testimony, he says: "We located the 'Edith' first

and located the other over it afterwards; that the 'Edith' had been staked and located on the ground first; that this was some time in June." The location notice of the "Edith" is then submitted to the witness, and after examining it, he testifies that this location notice was made and recorded for the "Edith" claim, and that the location was completed before the location of the "Kirby Fraction"; that the discovery points were close together; that they never abandoned the "Edith" location and never intended to abandon it; that they located the "Kirby Fraction" over the top of the "Edith," but did not intend to abandon the "Edith"; that they had the same character of discovery on the "Edith" that they had on the "Kirby Fraction."

In conveying this property, we find in every instance up to the time that Mr. Rutter conveyed to Mr. Bradley, the "Edith" location was recognized and conveyed. This brings the location of the "Kirby Fraction" within the rule laid down in Belk v. Meagher, 104 U. S., page 279. If the "Edith" location was a valid one, then the ground where the "Kirby" discovery is claimed to have ben made was not vacant or subject to location, and the "Kirby" location was a nullity. The testimony of Johns, in regard to the location of the "Edith" and "Kirby" claims, is fully substantiated by that of Sullivan, the other locator, who testified that they never intended to abandon the "Edith," but always recognized it as the location under which they claimed.

Nor can Mr. Rutter be heard to contend that the "Edith" location was abandoned. He has offered in evidence three deeds to himself, each reciting the "Edith" location, and these deeds were made long subsequent to the time when it is claimed the "Kirby" was located. Mr. Rutter can claim nothing so far as the "Kirby" title is concerned by virtue of being an innocent purchaser, or by virtue of any deception practiced upon him by his grantors, because the deeds to him gave him full notice of the "Edith" title and of the invalidity of the "Kirby" location.

Neither can Mr. Bradley claim anything as an innocent purchaser, as against the "Edith" title, because all of the deeds of his grantors under which he claims recite the fact of the "Edith" location.

The plaintiffs cannot recover in this action by reason of the fact that they are owners of the "Edith" title. They have not relied upon that title in adversing the "Shoshone" in the Land Office. They have filed no plat showing any conflict between that claim and the "Shoshone." They have no abstract of title of that claim. They have made no protest on behalf of it against the application of the defendant for patent. They have set up no title to that claim in their Bill of Complaint in this action. There is no issue joined as to the validity or invalidity of the "Edith" location. The fact that there is an identity of locators as between these two claims

cannot help the plaintiffs in this action, as it is the mining claim that is contesting the application of the defendant for patent and not the owners, except incidentally.

Weill v. Lucerne Mining Co., 11 Nev., 200.

If, therefore, the testimony of those locators is to be believed, when they testified that they had on the 10th day of June, 1886, located the "Edith" claim, upon the ground in controversy, and that a month later, in July, without any intention of abandoning the "Edith" location, they had sought to locate another claim, called the "Kirby" based upon a discovery within the lines of the "Edith" then the location of the "Kirby" is a nullity, and the plaintiffs cannot recover in this action upon that title, nor can they defeat the application of the defendants in the Land Office by interposing the "Kirby" title against it.

The only possible chance for the plaintiffs to sustain the "Kirby" title must rest upon their ability to show an abandonment of the "Edith" before the location of the "Kirby"

---

(EDITH LOCATION.)

In the case of Golden Terra Min. Co. v. Mahler, et al., decided by the Supreme Court of Dakota, reported in the 4th Morrison, page 390, it is held that if two locations of mining claims are made by the same party which interfere with

each other, the scond location includes only so much ground as is exclusive of the first, and if the discovery of the second is within the boundaries of the first location, such second location is invalid, for it is a condition precedent to the location of a mining claim that the discovery of a vein bearing valuable minerals shall first be made within the limits of such location independent of any other subsisting and valid location. It is upon the public mining lands that the vein must be discoverd.

This decision seems to be squarely in point on the proposition under consideration, and completely meets and refutes the position assumed by counsel for plaintiffs, that because there was an identity of locators of the "Edith" and "Kirby" claims, that it is no concern of the outside world under which title they shall claim the ground. We insist that the location of the "Edith" having segregated the ground from the public domain, that the location of the "Kirby" was invalid.

---

## WAS THE "EDITH" ABANDONED PRIOR TO THE LOCATION OF THE "KIRBY."

The terms "forfeiture" and "abandonment" are not synonymous. The first depends upon acts alone, the second

largely upon intention. In the first intention is immaterial, in the second it is everything.

Park v. Heatin, 4th Mor., 447.
St. John v. Kidd, 4th Mor., 454.
Mallett v. Uncle Sam G. & S. M. Co., 1st Mor., 17.

Whether or not a mining claim has been abandoned, is a question of intent.

Waring v. Crow, 5th Mor., 204.
Bell v. Bedrock M. Co., 1st Mor., 45.
Marenhaut v. Wilson, 1st Mor., 53.
Stone v. Geyser M. Co., 1st Mor., 59.
Meyer v. Spooner, 9th Mor., 519.
Taylor v. Middleton, 67 Cal., 656.
Derry v. Ross, et al., 5th Colo., 295.
Omar v. Soper, 18 Pac., 443.
Weill v. Lucerne M. Co., 3rd Mor., 372.

The next inquiry which arises is as to the source from which we shall gather evidence of intention to abandon.

In this case one of the locators is dead. The only evidence of his intent in the matter is to be gathered from the deed which he executed to Rutter, one of the plaintiffs. In this deed he recites the "Edith" location and conveys it. The locator Charlebois appears to have taken no active part either in the location or holding of the two claims. It is not

shown that he was ever on the ground, and we have no act or word of his from which to gather information as to his intention. The locator Johns testifies for the plaintiffs, that the "Edith" was the first location. That the locators had no intention of abandoning it at or before the time of the location of the "Kirby." That the "Kirby" was located only for the purpose of taking in more ground, and it would seem from his testimony that they did not know that the location of the "Kirby" based upon a discovery within the lines of a claim already located would be void. This locator Johns also conveys the "Edith" location as though it were an existing valid claim about a year after the location of the "Kirby." These are the acts and declarations from which his intention may be gathered. The other and only remaining locator is Sullivan, who seems to have actively participated in the location of these claims. He testifies that the "Edith" was the first location; that the locators of the claims had no intention of abandoning it at or before the time of the location of the "Kirby"; that the "Kirby" was located only for the purpose of taking in more ground, and it would appear from his testimony that he did not know that a location made upon a discovery within the boundaries of an existing claim would be void. He testifies unequivocally that they had no intention of abandoning the "Edith" claim or location. He also by deed, made long after the location of the "Kirby Fraction," conveys the "Edith" claim in connection with the "Kirby

Fraction." We must, therefore, look further for evidence of intention to abandon the "Edith" location on the part of any person competent to act in the matter. It doesn't make any difference as to what Mr. Rutter's intention was at the time he deeded to Mr. Bradley nor what Mr. Bradley's intention was, nor does it make any difference what the intention of the original locators, either of the "Edith" or of the "Kirby" may have been subsequent to the location of the "Kirby"; the question is as to the status of this ground at the time of the location of the "Kirby."

A subsequent failure of title, or abandonment of the "Edith" after the attempted location of the "Kirby" would not validate the "Kirby" location.

Oscamp v. Crystal River M. C., 58 Fed., 293.
Omar v. Soper, 11th Colo., 380, 18th Pac., 443.

The location of the "Kirby" to entitle the plaintiffs to prevail in this action must have been good and valid at the time it was made—it must have been made upon lands subject to location under conditions authorizing such location.

Belk v. Meagher, 104 U. S., 279.

In adverse proceedings the defendant may defeat the plaintiffs' claim by showing that plaintiffs' location was upon

land not subject to location, having been included within the exterior limits of an existing claim.

Girard v. Carson, 44 Pac., 508.

Upon the showing of the plaintiffs, the location of the "Kirby" was void, for the reason that the ground was not subject to location at the time when it is claimed the "Kirby" was located.

---

## WAS THE "KIRBY FRACTION" A VALID LOCATION.

In deciding this question the Court says: "Were it required that the evidence should remove all reasonable doubt I should answer this question in the negative, but under the liberal rule that prevails as to the constitution of a ledge within the law, I think the preponderance of evidence is in favor of such a discovery." (Transcript, p. 70).

The Court later says: "It has also been suggested that thus far the plaintiff's ledge has not been proven a valuable one—that is not necessary, if it is sufficient in the beginning to justify a location, *which I have reluctantly held*, it is sufficient for all time, even if it never becomes valuable."

I think we may safely say that the court shows decided dissatisfaction with its conclusion in this case so far as the title of the "Kirby Fraction" is concerned. The Court says: "Just when this discovery was made, I have not taken time to determine from the testimony except that it was before the locaton of the "Shoshone." While I personally feel that any location of a mining claim, made before the discovery of a vein or lode within its limits should be held void *ab initio* such opinion must yield to what is deemed the preponderance of authority." (Transcript, page 71).

The "preponderance of authority" relied upon in support of this conclusion is distinguished rather by its "oft repeated assertion" than by the binding authority of the tribunal announcing it. The question has been before the Supreme Court of the United States but once, in the case of Larkin v. Upton, 144 U. S., 19. The suit was one brought in support of an adverse claim and was tried by a jury, which decision must be considered in connection with the report of the case below. The case was first before the Supreme Court of Montana on the sole question of whether a location made before a discovery would be validated by a subsequent discovery.

Upton v. Larkin, 5 Mont., 600.

The Supreme Court of Montana gives the question full consideration and holds that a location void for want of dis-

covery is not rendered valid by a subsequent discovery and meets every argument advanced against that conclusion in this case. The question was again before the Supreme Court of Montana on second appeal. (7th Montana, 449). The same question was up for decision and the Court gives additional force to its former conclusion.

The Court says: "The next error specified is that one of the defendants, Larkin, was not allowed to testify as to the width and richness of the vein, as shown by work subsequent to the location of the Smelter lode. We think that the objection was properly sustained. Whether or not the defendants were entitled to recover depended upon discovery before location. No discovery made after location would make that location valid."

The case of Jupiter Mining Co. v. Bodie, relied on by respondents, is discussed and criticised on page 602, 5th Mont., and the whole question is thoroughly and completely disposed of upon authority. When the case came before the Supreme Court of Montana the second time as reported in the 7th Mont., page 449, this same question came up together with certain other questions.

This case then went to the Supreme Court of the United States and is reported in 144 U. S., page 19. The decision is rendered by Justice Brewer, and is the unanimous opinion of the Court. Justice Brewer in the statement of facts, says

that the case was reversed by the Supreme Court of Montana on the ground that there had been no discovery of a vein or lode within the "Comanche" territory *at the time of the location of the claim*. He then recites the fact that the contest on the second trial was as to the position of a discovery shaft and of the apex of the vein disclosed by it, on the boundary between the "Comanche" and "Shannon" claims, and that the testimony of the defendants tended to show that it was wholly on the "Shannon" claim, and that of the plaintiffs that it was partly on both claims. It seems to have been considered necessary that the "Comanche" should own a part of that shaft inasmuch as whatever discovery there was, was in the shaft and the "Comanche" could only recover upon establishing the fact that at the time of or prior to its location, it had discovered the apex of the lode in that shaft. The Court beyond any question, considered that the vital question upon which the case turned, and that he approves the doctrine laid down by the Supreme Court of Montana, both upon the first and second trials, wherein they held that the discovery must be made before location seems not open to doubt. The verdict in the case was in favor of the plaintiffs upon both trials. The plaintiff won solely upon the ground that the defendant had not discovered a lode prior to the making of the location.

In the case at bar the testimony of the locators shows that no discovery was made upon the "Kirby Fraction" prior

to or at the time of the location of the claim, but they claim that a discovery was made long subsequent to such location but prior to the location of the defendant's claims, and asked the court to hold that this subsequent discovery validated the location.

The question as to whether or not a subsequent discovery would make good a location that was void for want of discovery was before the United States Circuit Court in the case of Van Zandt vs. The Argentine Min. Co. reported in the 2d McCrary, page 159, affirmed in 122 U. S., 478.

In that case it is held, "Under the statutes Federal and State, no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim; and a discovery shaft must be sunk thereon to the depth of at least ten feet. The mineral or ore so discovered must be in position in the form of a lode and not in a broken and fragmentary condition, intermingled with slide and debris on the surface. *Discovery of ore after location* in a different part of the claim *will not avail.*"

"The burden is on the plaintiff to establish the fact that ore was so found in his discovery shaft, and that the same lode is continuous to the ground in controversy."

I quote from the syllabus which is fully borne out by the opinion.

Section 2320 of the Revised Stat. of the U. S. provides that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

This language is so explicit that it can need no interpretation other than the direct application of the principle therein stated to the facts. It is mandatory in character, both in the letter and spirit of its provisions. From its position in the section it was evidently an amendment made for a specific and definite purpose. It is right in principle. The United States Supreme Court in the case of Gwillim vs. Donnellan, 115 U. S., 45, Belk vs. Meagher, 104 U. S., 279, have said that a valid location duly made has the effect of a grant by the United States to the right of present and exclusive possession. That it segregates the ground located from the public domain, and exempts it from the operation of the license given by the mining statutes to the prospector. It was the manifest intention of Congress that this segregation should not take place, that this exclusion of the prospector should not be effectual, until in the language of section 2320 "the discovery of a vein or lode within the limits of the claim located."

If the principle contended for by plaintiffs that a locator could by marking the boundaries of a claim upon the ground and recording a notice of location in effect segregate the land included from the public domain and exclude prospectors

therefrom until he should at some subsequent period discover within the enclosure a lode or vein, is to be maintained by the Courts, then that portion of section 2320 becomes inoperative and the location of a mining claim instead of being something definite and certain would be simply an experiment on the part of the prospector to be worked out at his leisure. If he can hold the claim and exclude others from it for a day he can do so for an indefinite time, because, under the law, when he has staked his boundaries and recorded his claim he is entitled to the exclusive possession of that ground, and no opportunity can exist for any other prospector to make a discovery within the limits of the claim, without being liable as a trespasser. This would result in covering the country with bogus locations made for the purpose of excluding others until such time as the experiment of determining whether or not a lode existed in the claim should be worked out by the locator.

The respondents contend that if a locator, not having made a discovery at the time or prior to his location, made one afterward, before the rights of third persons intervene, that his location is thereby made good as of the date of the original claim, and cites and relies upon, Strepey vs. Stark; Jupiter Mining Company vs. Bodie; Zollars & Terra vs. Smith; Patchen vs. Kelly, and McEvoy vs. Hyman.

I desire to review the facts of these several cases some-

what in detail that we may see just what was decided in each of them.

In Strepey vs. Stark, 7 Col., 614, the first case cited by plaintiff's counsel, the question was as to whether or not the locators of the "Negro" lode sunk their shaft ten feet deep within the time required by the laws of Colorado. It appears from the Statement of Facts in this case, page 615, that they established the fact of the discovery of mineral and contended that they sunk a shaft of over ten feet deep. The claimants of the "Little Bell" contended that in 1880 when they went upon the ground this cut which the locators of the "Negro" had made was but four or five feet deep and that they sunk it to the depth of fifteen feet and took out mineral and located it. The Court says at page 618:

"Under the law four certain things are to be done in order to perfect a location. First, the sinking of a discovery shaft upon the lode ten feet in depth or deeper if necessary to disclose mineral in place."

This statement of the Court presupposes the discovery of a lode because it says that the requirement is to sink a shaft upon the ledge ten feet deep or deeper if necessary to disclose the mineral in place. The question here, was not as to the discovery of the lode prior to the location of the claim as required by the Act of Congress, but as to the necessity of com-

plying with the local laws of Colorado with reference to the performance of certain work as a preliminary to the location. The laws of Colorado are not the basis of the grant to the locator. There is no title resting in the State of Colorado of which it may dispose. The Act of Congress requiring the discovery of a lode is mandatory. The respondents contended that the appellee had not performed these various acts required by the laws of Colorado to be done after the discovery, within the time prescribed by the Statutes of Colorado, but it seems to be admitted that they were performed before the entry of the respondents. The Court held that that was sufficient to sustain the appellee's title.

I think we may, therefore, safely say, that the case of Stepey vs. Stark, does not sustain the contention that a location may be made before discovery and cured by subsequent discovery, which will relate back to the original date of location.

The next case relied upon by plaintiff is the Jupiter Min. Co. vs. Bodie, 4th Mor., 411. This is by Judge Sawyer, and is contained in a charge given to a jury. The same weight is not to be attached to these expressions of a judge as are given to those of an appellate court sitting to determine the law with that deliberation which an appellate court is enabled to give, as distinguished from a hurried consideration given to these questions by a judge in charging a jury, but in this

case, the principal contention was as to the identity of a lode claimed in an adjacent location, one being called the "Actaeon" and the other the "Fortuna." Another question involved was as to whether or not the proper apex of this vein was within the side lines of one of the plaintiff's claims drawn vertically downward. The Court instructed the jury as to what was necessary to constitute a discovery and location. On page 422 he recites the provisions of Section 2320 with reference to the necessity of discovering a lode prior to the location and says: "The Statutes also provide: Gentlemen of the jury, that 'no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located,' and further says that no rights can be acquired under the Statute by the location made before the discovery of a vein or lode within the limits of the claim located; that a vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or with some other kind of rock in place carrying gold, silver or some other valuable mineral deposit named in the statute. It is not enough to discover detached pieces of quartz or mere bunches of quartz not in place. The vein, however, may be very thin or it may be many feet thick or thin in places—almost or quite pinched out, in miner's phrase—and in other places widening out in extensive ore bodies. So, also, in places it may be quite or nearly barren, and other places immensely rich. It is only necessary to discover a genuine mineral vein or lode whether small or

large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location including the vein or lode. It may and often does require much time, labor, care and expense to develop the vein or lode after discovery and location sufficient to determine whether there is really a valuable mine or not, and the location would be necessary before incurring such expense in developing the vein, to secure to the miner the fruits of his labor and expense, in case a rich mine should be developed. If then the locators of the "Lucky Jack" discovered such a mineral vein or lode as I have described, however small, before the location of that claim the location of the claim embracing within its lines the vein or lode so discovered was in this particular valid, otherwise not."

The Court then instructed the jury that having heard the testimony on this point, it was for them to determine the fact. The jury is then further instructed that it is not necessary that the locator should be the first discoverer of a vein, but it must be known to him and claimed by him in order to give validity to the location.

We now come to the portion of this decision upon which plaintiffs rely in support of their contention that a subsequent discovery makes good a location void for want of discovery and the language of the Court is as follows:

"I instruct you further that if a party should make a loca-

tion in all other respects regular, and in accordance with the laws, rules, regulations and customs in force at the place and at the time upon a supposed vein, before discovery of the true vein or lode, and did sufficient work to hold the claim, and after such location should discover a vein or lode within the limits of the claim, before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim, and the location valid."

This must be read in connection with that part of the instructions immediately preceding it, which I have already quoted.

The Court used the term "supposed vein," and "true vein." Under the facts as they are stated in the instructions there had actually been a discovery of that which led to ore in this case. The law allows a valid location to be made upon "such indications of the existence of a vein as a miner would follow with the expectation of finding ore."

This doctrine was established in the case of Harrington vs. Chambers by the Supreme Court of the United States. Applying this rule to that portion of the instructions relied upon by the plaintiffs in this case we find that what the locators of the "Lucky Jack" actually did discover, proved upon development to be a vein, and the question before the jury was

whether or not this demonstration of an existing fact must be made before location or might be made afterward. We do not contend that the discovery of the vein must be developed to the extent of disclosing the fact that it is a "main vein," or that it is a "paying vein," but we do contend that a miner must discover that which he can follow and find ore, and that this discovery must be prior to the location of his claim. There is nothing in the instructions given by Judge Sawyer to the jury relied upon by plaintiffs to support their general statement that a subsequent discovery will give validity to a void location.

The next case relied on by plaintiffs is that of Zollars vs. Evans, 4th Mor. 407, which also consists of instructions to the jury by Judge Hallett. I would make the same suggestion as to the weight to be given to this kind of an authority as distinguished from one which is a deliberate judgment of a Court of Review.

The Court instructed the jury that they must find as to the discovery in the "Highland Mary" discovery shaft and whether it extended from that discovery shaft to the ground in controversy. The "Highland Chief" people had sunk a shaft just outside of the ground in dispute, and had run drifts from their shaft into the ground in dispute. The controversy was as to the ground outside of the point of discovery of both claims and involved the question as to whether or not a lode

if discovered at the point of discovery extended into the ground in controversy and the question of the identity of the mineral bodies. The Court says to the jury:

"Perhaps there is some doubt here also whether any body of mineral or mineralized rock that may be called a lode was found in the discovery shaft, and if so found, whether the same body was exposed in the territory in dispute. Those questions are submitted to your decision on the evidence, and assuming that the plaintiffs have established their rights, as before explained to you, if you further find that the defendants' grantors discovered a lode in the "Eliza" discovery shaft and that said lode extended from thence into the ground in dispute, the defendants will prevail."

The learned judge then comes to the portion of the instructions upon which plaintiffs rely, which is as follows:

"As was before explained to you, plaintiff's right cannot be of earlier date than July 30th, 1879; and defendant, if his grantors made a valid discovery and location, dates back to 1878; long prior to the date of plaintiff's title by possession. It is true that there is some controversy upon the question whether at the time of the survey of the "Eliza" lode in July, 1878, the locators had sunk their shaft to a point where they claimed to have found the lode; but if they had not done so, they did in effect sink to the point mentioned by September

following, and if they did then find the lode they could have the advantage of it against all who had not then acquired an interest in the lode in the same manner as if they had uncovered it before making their survey and filing their certificate."

The court speaks of the time of the "survey." The particular claims under consideration were located upon the ground by survey, in 1878. The contention appears to have been as to whether or not the locators sunk their shaft as provided by section 2401 of the Revised Statutes of Colorado, which required the sinking of a shaft after the discovery of the lode. You might discover a lode under the laws of Colorado at the surface; the discovery would be good under the nations law, but under the laws of that state the location would not be perfected until after you had sunk ten feet upon this lode and the question frequently arose, and it seems to have arisen in all these Colorado cases, relied upon by plaintiffs, whether or not the shaft was sunk the requisite depth before location of the claim. The question of the discovery of mineral seems to have been merely incidental.

I would again direct the Court's attention to the distinction between a failure to perform the acts required by a state law, which are mere regulations, and a failure to perform those things required by the Act of Congress, which is the basis of title.

The next case cited and relied upon by counsel in support of the proposition that a subsequent discovery made valid a location void for want of discovery, is the case of the Golden Terra M. Co. vs. Mahler, 4th Morrison, 390, which is merely the findings of a District Judge of Dakota at trial, and not a decision of any Appellate Court.

In this case, however, the Court says: "I am of the opinion and so hold, that the spirit and intent of the Act of Congress is to require as a condition precedent to the location of a mining claim, that a discovery of a vein bearing valuable minerals shall first be made within the limits of such location independent of any other subsisting and valid location."

And this Judge in the findings (page 399, 4th Mor.), says: That even though no discovery of a vein was made in the "Ophir" claim at the time of its attempted location in June, 1876, that still if such discovery was made therein prior to any discovery of a vein within the defendant's mining claim, the Golden Terra Extension, that the Ophir claim would be good from the date of such discovery. No authority is cited by this Judge in support of this proposition. He simply says that he thinks the proposition is sound law, that the order of the acts to be performed is not essential, provided that no intervening rights of others have accrued. It does not appear from the Statement of Facts made by the Court in this case,

so far as we have been able to understand it, that there was an entire absence of mineral bearing rock at the discovery of the Ophir at the time, or prior to the location, but it was only a question of the discovery of the "vein." Without a fuller statement of the facts as to what actually did exist at the discovery point at the time of the location no intelligent application of this doctrine can be made, even admiting that it is an authority that may be followed. But the facts as stated by he Court at page 401, would indicate that the gold was found in the slate and that the slate was a country rock, and that the material on the surface at the point of discovery of the Ophir claim was really mineral bearing rock in place.

But the conclusions of the judge in this case amount to no more than the argument or brief of counsel. They would not even be authority in the Courts of Dakota, being only the findings of a Judge sitting at the trial.

The case on appeal was decided on other points. 2nd Dakota, 377.

The next case relied on by plaintiffs is that of Patchen vs. Keeley, 14th Pac., page 347, a decision by the Supreme Court of Nevada.

This was an action of trespass, *quare clausum fregit*, and the Court says:

"It is enough to say that plaintiff was not obliged as

against defendants to prove any better title than actual possession gave him. It was not necessary for him to prove the discovery of any lode within the boundaries of his claim, prior to location. In a word, in order to make a *prima facie* case 'against defendants, having shown possession, plaintiff was not obliged to prove a valid location. Defendants were not in position to assail plaintiff's title."

The whole case turned upon possession and not upon title. It was the case of a trespasser going in without title, or claim of title, and attempting to raise technical objections against the title of a man whose possession he had invaded. It can in no degree support the plaintiffs' contention.

The next and last case cited and relied upon by plaintiffs is that of McEvoy vs. Hyman, 15 Mor., 397.

This case turned upon the sufficiency of the amended location notice. The Court held that after the original certificate of the "Durant" location was amended, that certificate and the amendment were properly received in evidence as constituting a perfect certificate having effect from the date of the original. In this view of the case it is held that the "Durant" title is superior to the other, and must prevail, and the Court says the other questions in the case may be passed without discussion. The decision in no manner supports the position contended for by plaintiff in this case.

We have now reviewed all of the cases cited by plaintiffs' counsel in support of this contention and we find but two of them to be decisions of Appellate Courts, namely, Strepey vs. Stark, and Patchen vs. Keeley. Jupiter M. Co. vs. Bodie, is simply a report of instructions given to the jury by Judge Sawyer. Zollars vs. Evans, is instructions given to the jury by Judge Hallett. Golden Terra vs. Smith is the findings of Judge Moody at that trial. Patchen vs. Keeley is a decision of the Supreme Court of Nevada which in no manner supports the contention of the plaintiffs. McEvoy vs. Hyman seems to be a decision rendered by Judge Hallett, in a suit in ejectment when a jury was waived.

---

## DID THE LOCATORS OF THE "KIRBY FRACTION" EVER MAKE A DISCOVERY?

Witness Johns, one of the locators, says: They found float. (Trans. p. 145.) That they afterwards ran a cut into the solid rock, and while he frequently speaks of making a discovery, yet when he is asked directly as to the nature of that discovery, he fails to establish one. The first testimony we have is on Trans. p. 146, where he says that in this cut which they ran about twenty feet, under cover, long after the location of the claim, they found "quartzite," "clay," and "rock,"—"mineral bearing rock, containing a trace of lead

and silver." He says at Trans. p. 147, that they had the same character of discovery on the "Edith" that they had on the "Kirby." That it was just as good on one as on the other. At Trans. p. 149 he says, they made a discovery on the "Edith;" that there was as much work done on the "Edith" as on the "Kirby." That they were actually working on the "Edith at the time they located the "Kirby."

Sullivan testifies substantially to the same facts, and that there was no discovery made on the "Kirby."

But whatever these locators may say about making a discovery, we must always bear in mind that a discovery should be as apparent to those investigating the matter at any subsequent period as it was to those who claim to have made it. It must necessarily be continuing in its nature, and if there was a discovery made there by Sullivan or Day, or any other locator, it should and would be there now. We have had pointed out to us by the testimony of Loring, Bradley, Burch, Burbidge, McDonald and Linney that which they rely upon as a discovery. They claim that it exists now. Waiving, for the purpose of this consideration, the question as to when it was made, we contend that even now they have utterly failed to show a discovery, or the existence of such a lode, or mineral bearing rock in place as would validate the "Kirby" location. It is but a fair inference from the testimony in this case, that every effort which a liberal expendi-

ture of money could make, has been made for the purpose of trimming up, marking out and making apparent a lode or several lodes or stringers in, and connected with, the tunnel. We will take them in the order in which they are claimed to exist by the witnesses McDonald, Bradley and Burch. McDonald says: Commencing at the mouth of the tunnel No. 1, is a well defined ledge about two inches thick. He speaks of it in most positive terms. Says the walls bear evidence of striation. This seems to be about fifteen feet in, under cover. Two assays taken from this place by Burbidge show: The first, ½ oz. silver, and the second, 6-10 of an ounce of silver per ton. Neither of them shows any lead. Some of the witnesses testified that a silver result can be obtained from any of the country rock in that section. We are prepared, however, to admit that if, at the discovery of a claim, mineral bearing rock in place carrying ½ oz. or 6-10 of an ounce in silver was found under such conditions that a miner might be justified in following it with the expectation of finding ore of better quantity and quality, it might constitute the basis of a location; but in this case we find that these people did not consider this crevice, or seam, or whatever it may be, a sufficient indication for them to follow upon. According to the testimony, it was first uncovered eleven years ago, and during all of the intervening time they have not attempted to follow it nor have they shown any inclination to do so, "with the expectation of finding ore." We must take this as the

judgment of the locator, or those who have succeeded him in interest; but we desire at this point to suggest to the Court that while it is true a location may be made upon such indications of "rock in place," as a miner might follow with the expectation of finding ore, nevertheless if the miner does commence development upon such indication and it is after thorough exploration demonstrated that it is not a ledge of mineral bearing rock in place then his location would be void.

The Court in the case of the Waterloo Min. Co. vs. Doe, 56 Federal, 685, gives us a clear exposition of this doctrine. In that case several tons of ore yielding $600 had been extracted from a mining claim, and it was claimed that upon this showing, the location would be good. The Court holds, after reviewing the testimony that the fact that three tons of silver bearing rock, yielding $600, had been extracted from a mining claim, does not entitle the locator of a mining claim to enter the claim for patent, where there is no vein at the point of discovery or within the limits of the claim, the location having been made merely in the hope of finding such at some future period. The Court held that neither party was entitled to enter the ground.

In the case at bar after eleven years of exploration the "Kirby" claimants have failed to find anything carrying more than a trace of either silver or lead.

It would appear from the testimony of the plaintiff's witnesses, that the further they follow what they call the ledge in this mine, the poorer the material becomes. Burbridge claims to have found one-half ounce of silver in what they call vein number one, seven-tenths of an ounce in vein number two, three-tenths of an ounce in vein number three, one-half ounce still further in, five-tenths of an ounce at the bottom of the winze in the drift, four-tenths of an ounce still further in, and three-tenths of an ounce in the face of the tunnel.

W. H. Linney, one of the plaintiff's assayers who made the test of the material taken from the various places in the work by Burch, the superintendent of the Bunker Hill & Sullivan Mining & Concentrating Company (which company, we may safely say, is the real plaintiff in this case), gets results in no instance of over four-tenths of an ounce in silver, and finds no lead in excess of three-tenths of one per cent in one assay, and in three of his assays gets no lead at all. We may safely assert that these samples were taken from the parts of the work which looked most favorable to the plaintiffs.

Can it be said that after eleven years of development work upon these cracks or crevices in the earth with no better result than shown by the plaintiffs themselves, that there has ever been a discovery in this "Kirby" claim so far as the plaintiffs are concerned—such indications as a miner might

follow and find ore? It seems to us that the further they follow these indications the less ore they find.

The assertion of conclusions by witnesses, however positive, and whatever their record may be, so far as experience is concerned, of the existence of a lode in the "Kirby" claim, must give way to actual tests made of the material which, such witnesses declare, constitutes the ledge. We might pile up witness after witness, testimony upon testimony as to the existence of mineral in the rock, but the actual test and analysis made by one competent person would destroy the effect of such testimony, however voluminous and positive it might be.

The testimony of the appellant's witnesses is fully sustained by chemical tests of the rock made by the assayers of both the plaintiffs and defendant.

Col. Lindsay, whose experience is quite as wide as that of any of the respondent's witnesses so far as mining is concerned and whose employment as superintendent by some of the largest mining and milling companies of the United States, especially qualifies him to testify as to the character of rock, says: There is no ledge disclosed or discovered in the work upon the "Kirby Fraction": that there are a lot of seams or cracks such as may be found in the formation similar to that of the "Kirby Fraction," but that they do not constitute

ledges of mineral bearing rock in place. Mr. Fassett, who went upon the ground for the purpose of taking samples of all of the material claimed to be ledge matter and who did make a very thorough examination of the mine and a careful and competent analysis of the material, testifies that in no instance did he find to exceed ½ ounce of silver, or 4-10 of one per cent lead, and in that portion of the work which is claimed to be a ledge he found nothing at all. Neither Mr. Fassett nor Col. Lindsay is in the employ of, or in any manner connected with any of the parties to this suit. All of the witnesses for the plaintiffs on this subject who examined or made tests of the ore were in the employ of, or connected with the Bunker Hill & Sullivan Mining & Concentrating Company.

It being admitted by the locators of the "Kirby Fraction" or the "Edith," whichever it may be called, that no discovery of a lode or vein was made at the time of the location, then the burden of showing that a discovery, if made at all, was made prior to the 21st day of March, 1894, that being the date of the Shoshone mining claim, rests most strongly upon the plaintiff and the lenient rule stated by the Judge. (Folio 71).

From the testimony of Josiah Hill (Trans. p. 83), who did the work in 1892, it could not possibly be found that any ledge such as the law contemplates had been discovered upon that claim. It is not claimed that any further work was done

in 1893 or 1894, these being the two years during which the performance of annual labor was exempted by the Act of Congress. It appeared that the witness Smith (Trans. p. 83) was testifying as to what he was doing in July, 1896. Edward Sullivan, one of the locators of the "Kirby Fraction," says (Trans. p. 107, folio 221) that they never made any discovery on the "Kirby," and that he did not know or talk with Smith prior to the trial. Mr. Rutter, one of the defendants, says that he did no work personally in 1892, 1893 or 1894 on these claims, but his testimony establishes no discovery up to that time, and it is apparent from all the testimony that if any such discovery as seems to have satisfied the mind of the trial Court was made, it was made after the location of the Shoshone mining claim.

We feel safe in concluding that not only was no discovery ever made upon the "Kirby Fraction" claim prior to the location thereof, but that none has ever since been made, and that any attempted location upon that claim was and is now void for want of discovery.

---

## RECAPITULATION OF OBJECTIONS TO PLAINTIFFS' TITLE.

### I.

That the ground was not vacant and subject to location

at the time of the location of the "Kirby Fraction."

II.

That no discovery of a ledge or vein of mineral bearing rock in place was made upon the "Kirby Fraction" prior to the location thereof, or prior to the location of the "Shoshone" claim.

III.

That no discovery of a lode or vein of mineral bearing rock in place has ever been made upon the "Kirby Fraction."

IV.

That the annual assessment work upon the "Kirby Fraction" claim for 1895 and 1896, was not performed by the plaintiffs or any person under whom they claim, and that the affidavits sworn to by Bradley, one of the plaintiffs, that such work was done by the Bunker Hill & Sullivan Mining & Concentrating Company, and that said company was the owner of the "Kirby Fraction" claim is an admission by the plaintiffs that the plaintiffs are not the real owners of the "Kirby Fraction" claim or the persons interested in this action.

And we contend that each and every one of these objections against the plaintiffs' right of recovery is good and should be sustained by the Court.

## ERRORS AT TRIAL.

The 4th, 5th, 6th and 7th assignment of error are based upon the refusal to admit in evidence the four instruments in writing signed, sworn to and recorded by one of the plaintiffs in this action. (Trans. p. 50-54). Those proofs were offered for several purposes. First, when taken in connection with the examination of the plaintiffs, for the purpose of showing that the plaintiffs were not the real parties in interest, and not entitled to maintain this action.

The Revised Statutes of Idaho, Section 4090, provide: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by this code."

It is not claimed that the plaintiffs sue for any other person, or that they are within any of the exceptions named in the statute.

A party not having title cannot maintain an action in the United States Courts to quiet title or remove a cloud, and the proofs offered showed that one of the plaintiffs had declared in effect, under oath, and has made it a matter of record, that the Bunker Hill and Sullivan Mining and Concentrating Company was the owner of the "Kirby Fraction" claim and had performed the annual labor on it for the years 1895 and 1896, which covers the time since before the application for patent. These proofs taken in connection with

the offer of the defendant to prove by the plaintiffs when on the witness stand that they had no real interest, were sufficient to establish the fact that the plaintiffs were not entitled to a patent for the "Kirby Fraction" mining claim. When both Bradley and Rutter were on the witness stand, we sought to prove by them that they were not the owners of any interest in the "Kirby Fraction" claim, and the Court denied us the right. (Trans. p. 81-92-93-95-96). The 8th and 9th assignments of error are based on this ruling of the Court.

The tenth assignment of error is directed to the refusal of the Court to permit the defendant to show by examination of the plaintiff Bradley that all the assessment work which had been done on the "Kirby Fraction" claim and to which any proofs offered by plaintiffs referred, had been done by and paid for by the Bunker Hill and Sullivan Mining and Concentrating Company as the owners of the claim and that he had filed sworn statements to that effect. All of this class of testimony was excluded by the Court. If the assessment work on the claim was done by a stranger to the title under a claim of adverse title these plaintiffs could claim nothing by virtue of it.

Turner v. Sawyer, 150 U. S., 578.

The twenty-fifth assignment of error is directed to the failure of the Court to make separate and distinct findings of

fact and conclusions of law and applies to each assignment of error after the seventeenth.

National Masonic Acc. Ass'n v. Sparks, 83 Fed. Rep., 225.

We have this conclusion from the foregoing. If the Bunker Hill Company is the owner of the "Kirby Fraction" claim then these plaintiffs cannot recover in this action; if said Company is not the owner of the property then its performance of annual labor cannot avail the plaintiffs. The allegations of the complaint that plaintiffs performed the requisite annual labor on the claim are denied, and in view of the fact that we offered to prove that the only labor that had been performed on the claim had been done by a stranger, and adverse claimant, and were prevented from so doing under the objection of plaintiffs and the ruling of the Court, there has been no sufficient proof of the performance of the annual labor, and the plaintiffs failed to prove a material issue necessary to entitle them to recover.

---

## APPELLANT'S TITLE.

We next come to the inquiry as to the sufficiency of the appellant's title to the "Shoshone" mining claim.

This location is based upon the discovery of a lode made more than one thousand feet below the surface of the ground by means of an entry through the tunnels of a neighboring

claim, which had penetrated into that portion of the ledge upon which the discovery was made. (The surface outcrop or apex of this ledge is not within the claims of either the plaintiffs or defendant, but is within the "Last Chance" and "Emma" claims, and probably crosses the "Stemwinder" into the "Bunker Hill"). It is stipulated in the record (Trans. p. 136-139) that the apex of the ledge upon which the "Shoshone" discovery was made is within the "Last Chance" claim. It is admitted that the ledge passes lengthwise through the Tyler on the north, and through the "Stemwinder" and "Bunker Hill" on the south.

The first, and perhaps the most important question so far as the title to the "Shoshone" claim is concerned, is whether or not a mining claim can be located upon the surface of the ground, or at all, based upon a discovery made on a ledge deep in the ground, where the apex and the outcrop of the ledge is shown to belong to another mining claim, having no extra lateral rights.

The "Last Chance" mining claim lies practically east and west. The dip of the ledge having its apex within that claim is to the southwest. The United States Supreme Court in the case of the Last Chance Mining Co. v. the Tyler, 157 U. S., p. 683, has held that the "Last Chance" claim owns that portion of the ledge lying between the planes drawn on its side lines, which are held to be, at law, the end lines of the

claim. This would seem to cut off the right of the Last Chance to this ledge at its south side line. At the point where the ledge passes through said side line, it is from one thousand to twelve hundred feet below the surface of the earth. It is manifestly impossible to make any surface location upon that vein without discovering the ledge, by some method, at this depth. How then shall this discovery be made? No location of that ledge can be made without a discovery. Would a discovery made at the bottom of a shaft sunk from the surface down to the point where this ledge would be intersected have any more validity than a location based upon a discovery made by entering through a neighboring claim, as was done in this case? Will it be contended that the law has made no provisions by which a ledge so situated can be located at all? It was contended at the trial and upon the argument, that this location was invalid because other people owned the apex of it, and because the locator did not have any apex, but in fact the parties who own the apex of this ledge have no right to follow it to the point where the discovery of the "Shoshone" was made. The "Last Chance" cannot follow it beyond its south side line. If the "Emma" can be given extra lateral rights to the extent of the vein passing through that claim, disregarding the fact that the lines intersecting the ledge are not parallel, then it would be within the rights of the "Emma" upon the dip, were it not for the fact that the projection of the "Emma"

north line does not include the discovery point on the "Shoshone" claim.

It will be seen by projecting the north side line of the "Emma" and the south side line of the "Last Chance," that the discovery of the "Shoshone" is located upon an angle of ground lying between these lines so projected. This was the deliberate purpose of the locator, and the exact location was determined with great accuracy. Some maps used upon the trial that were not made with exactness, might not show the fact as it exists, but an accurate survey and platting of the lines of these claims will show that the discovery of the "Shoshone" claim is not within the projected lines of either the "Last Chance" or the "Emma." It was not within the lines of the "Kirby" as it was staked upon the ground and officially surveyed by Mr. Loring. The west line of this Loring survey of the "Kirby" was also determined with great precision, prior to the location of the "Shoshone," and the point in the vein selected as the discovery point of the "Shoshone" was not within the lines or the projected lines of any existing mining claim.

Under the order of survey issued by the Surveyor General of Idaho, upon the "Kirby" location, in 1889, F. C. Loring, to whom the order was then directed, in his official capacity in adjusting the lines of the "Kirby" claim, under the power and authority given him to make the official survey, adopted

the easterly end line of the location as the official end line and drew in the westerly end line to conform to it, thus drawing the southwest corner post in to a point as shown upon the small plat in evidence, and inserted herein marked "Map B, Exhibit 2," Trans. p. 75. Mr. Loring testified that he planted these official posts at the point thus indicated, and it is clearly in evidence that they remain there so far as we know until this day. Mr. Loring also admits that he gave Mr. Miller, another Deputy U. S. Mineral Surveyor, the notes and memorandum of this survey showing the drawing in of the southwest corner, and Mr. Miller, acting upon such information in locating the "Shoshone" claim, established the point of location of that claim to the westward of the westerly end line of the "Kirby Fraction" location thus established by Loring.

Counsel has sought to avoid this line on the ground that the owners of the claim did not authorize it or recognize it.

The 13th assignment of error is directed at the decision of the Court on this question and as to the real boundaries of the "Kirby Fraction" claim. Edward Sullivan, one of the locators of the "Kirby Fraction" claim, and at the time an owner, testified that: "We had an official survey made of the 'Kirby.' I was the owner of it at that time." (Transcript page 107). To the question: "Did you instruct Mr. Loring to draw in the corner of the 'Kirby' claim?" witness answered, "I think I authorized Mr. Spaulding to have Mr. Loring draw in the corner."

Mr. Loring testified on this question: (Trans. p. 74, Folio 156). "Mr. Sullivan was present with me on the 22nd of July when I was surveying. No one directed me how to make that survey. I used my own judgment entirely. Mr. Spaulding was not present when I made the actual survey. It was not made by his direction." In answer to a question by the Court, witness Loring said: "Mr. Spaulding employed me, he was the only man I ever knew in the transaction. The work of drawing in the line of the claim was entirely my own without any one's advice." On cross-examination witness said: "I had to make those end lines parallel. I retained the eastern end line. I paralleled the western end line with it. That was done under the direction of the Surveyor General." (Trans. page 75).

W. L. Spaulding testified on this subject:

"I know the 'Kirby' ground. I was once in possession of the ground by virtue of a bond. I employed Mr. Loring to make an official survey as requested by the owners, Mr. Rutter and Mr. Sullivan—the same Mr. Sullivan that was just on the witness stand. I had the survey made. I was directed by the owners of the claim.

"It was understood that I should go ahead and make the survey for patent; the authority was understood; it was one of the conditions of the bond. * * * Mr. Loring made that survey under my instructions."

Being shown the plat marked defendant's exhibit Q witness states that Mr. Loring gave him that plat as the result of his survey. (Trans. page 109).

"I was in possession of the property from March, 1889, to July, 1892. It was during that time that I had the survey made. Mr. Loring and myself had the order for survey fixed up. I don't know whether Mr. Rutter had anything to do with it or not."

On cross-examination witness testified: "I was in possession of that ground from March, 1889, to July, 1892. I was working on the ground. I quit in July, 1892. The survey was made in 1889. I was there when the survey was made, but not with Mr. Loring. We consulted about making it. The matter of the lines was left to Mr. Loring. We talked about drawing in the lines, and the best way to parallel the lines, Mr. Loring and I. After he had completed the work he gave me the plat of it." (Trans. page 109).

Notwithstanding the undisputed testimony of one of the locators, Mr. Sullivan, the Deputy Mineral Surveyor Loring, and W. L. Spaulding, who had the property under bond for three years, and as he says, with the understanding that he was to have it surveyed officially, the Court has found, in effect, that the drawing in of the west end line of the "Kirby" claim was without authority of the owners. The Court holds that it is immaterial as to whether or not the line had been

drawn in, yet we insist that it is material and that the record shows that the line was actually drawn in leaving the ground upon which the location notice of the "Shoshone" was posted outside the "Kirby Fraction" claim.

The appellant sought to show that the point of location and the point of posting the notice on the "Shoshone" claim was upon vacant ground and not within the lines of any other mining claim. It established this fact by showing the real lines of the "Kirby Fraction" claim as they had been drawn in six or seven years prior to the location of the "Shoshone" claim. The facts of this case show that after the "Shoshone" had applied for a patent, the "Kirby" claimants abandoned the lines as they had been officially surveyed and either adopted some old lines or extended their new lines so as to include the discovery point on the "Shoshone" claim for the purpose of embarrassing it and attempting to defeat its location by showing that its point of location and the posting of the notice was within the boundaries of an existing mining claim.

The grounds upon which the Court held it to be immaterial as to whether or not the point of posting of the notice of discovery of the "Shoshone" claim was within the "Kirby Fraction" lines seemed to be based upon the wrong assumption that the "Shoshone" is claiming something by virtue of the tunnel site law. It makes no such claim, nor has it ever at any time claimed anything under the provisions of that

law. Its claim is based upon the plain, simple, fact, that it discovered a ledge of mineral bearing rock in place belonging to no one, which was upon the public domain of the United States at a point not within the boundaries of any other mining claim; that upon making such discovery it posted a notice of location upon the surface at a point over the point of discovery within the boundaries of the surface claim located and based upon such discovery, and that by virtue of such location it was entitled to hold and patent the "Shoshone" claim under exactly the same conditions and the same rights as though discovery had been made upon the surface.

At the argument below some claim was made upon behalf of the "Stemwinder" mining claim to the ledge in question, and it was contended that these ore bodies upon which the "Shoshone" claim was located belonged to the "Stemwinder" ledge upon its dip. We will only say at this point that the "Stemwinder" mining claim has no extra lateral rights under any construction of the law. And neither the question, nor evidence upon which such question might be determined, is before the Court.

The Courts have not been called upon to determine specifically the question herein presented, as to the validity of the location of the "Shoshone" claim as based upon the discovery made upon a vein after it had left the side line of the "Last Chance." The nearest that the Court has come to a consid-

eration of the question was in the case of Van Zandt v. The Argentine Min. Co., 2nd McCrary, page 159, 8th Federal, page 725, 4th Mor. 441, which was affirmed by the United States Supreme Court in the 122 U. S., page 478. In this case the Court below held that ordinarily, the owner of a mining claim in which is found the top or apex of the ledge, can follow the vein within or without his side lines on its dip to any depth, yet if the same vein should have been previously discovered and located on the dip, such discovery will prevail against a junior discovery though located on the apex of the vein.

But we are met with the objection at the argument that it must be a prior location upon the dip, and that if the apex has once been located, no location can thereafter be made upon the dip.

But we are unable to see why any distinction should be made in the application of this principle. To illustrate, suppose two locations are made upon a vein adjoining each other but with diverging lines. They cover the apex, but because of the divergence of the lines a wedge shaped portion of the ledge would lie between them. What is to become of this section of the vein lying between these two claims on its dip in the earth, in the angle made by their divergence? Or suppose a single claim located in such shape that it had no extra lateral rights, had the apex of a vein which dipped out of its

lines at a great depth below the surface. The apex has already been located, but has been so located as to give no rights to follow and include this particular section of the vein on the dip. Will it be maintained that because some one had located the apex in such manner as to give him no right to include such portion of the vein, in depth, that it must be forever lost, and that no one could obtain title to it? Would it not be competent for a prospector to sink down from the surface and make a discovery of the vein at the point where the rights of neighboring claimants cease, and hold it from that point; and would it not be as competent for him, if he could gain access to it by means of a tunnel or underground working to make a discovery on the ledge and then come upon the surface and make his location? If such a location can be made, then we contend that the "Shoshone" comes entirely within the principle upon which it would rest.

It appears from the undisputed testimony, that in March, 1894, W. C. Miller, the locator of the "Shoshone" claim, entered through what is known as the "Sweeny" tunnel in the "Last Chance" claim and passed on beyond the "Last Chance" lines, to the point selected as the discovery point of the "Shoshone" claim, and there in a large ledge of galena ore, the existence and character of which are not disputed, he selected his discovery point. That he thereupon by accurate surveys and measurements, went upon the surface of the ground and posted a notice of location at a point directly over

the point selected as the discovery point. That he then proceeded to mark out the boundaries of the "Shoshone" claim, in the manner provided by law and recorded it in the proper office. That he afterwards conveyed the "Shoshone" claim to the defendant in this action, and that it has since that time expended a large amount of money in the further development of said vein and has applied for a patent for the surface ground originally located by Miller.

At the trial and on the argument of the case counsel for plaintiffs admitted that there was no connection or identity between the ledge upon which the "Shoshone" and "Ibex" claims were located and that which they pretend to have discovered in the "Kirby Fraction" location. It was contended at the trial that the vein which they claim to have discovered in the "Kirby Fraction" had an entirely different course, direction and character, from that upon which defendant's discoveries were made.

It is not contended that the apex or any part of the apex of the ledge, upon which the discovery of the "Shoshone" claim was based, lies within the plaintiff's claim. The respondents, therefore, can claim no right to the ledge located by the appellant by reason of the provisions of the law which give to the locator all other ledges than that located, the apeces of which lie within said location. We are thus brought back to the inquiry, if the appellant cannot hold, and does

not own, the ledge located in the "Shoshone," who does own it?

Because of the errors herein discussed, we submit that the judgment in the first of the consolidated cases was erroneous and should be reversed, and that the Circuit Court should be further instructed to dismiss the action for want of jurisdiction.

Respectfully submitted,

W. B. HEYBURN,

LYTTLETON PRICE,

Counsel for Appellant.

SHOSHONE MINING CO.,

Appellant.

v.

ROYAL J. RUTTER and F. W. BRADLEY,

Appellees.

---

## STATEMENT OF THE CASE.

This case is consolidated, for the purpose of appeal, with the case just submitted. It was commenced in the State Court of Idaho, and was removed to the United States Circuit Court for the Northern District of Idaho, because it was claimed that a federal question was involved. The parties are all citizens of Idaho.

In disposing of this case the trial Court merely says (Trans. 196): "The facts and the law applicable to this case being so similar to those in the case of Royal J. Rutter et al. v. The Shoshone Mining Company, just decided, it is deemed unnecessary to review either here, but making the decision in that case the basis for the action in this, judgment herein is rendered in favor of the defendants.

"BEATTY, Judge."

No other findings of fact or conclusions of law were made by the Court, and upon this a decree was rendered against the appellant and a perpetual injunction granted.

The same assignments of error relied upon in the former case, herein considered, are adopted for and applied to this part of the consolidated appeal, under the stipulation and order consolidating the two cases on appeal.

---

## ARGUMENT.

Had the case remained in the State Court, under the rule of action established by the Supreme Court of Idaho, in the case of Burke v. McDonald, 13 Pac., 351, the parties would have been entitled to a jury trial. By removing this case to the United States Court, they were deprived of that right under the ruling of that Court that the proceeding was in equity.

If the civil action brought in the State Courts is essentially, as hitherto understood, a suit at common law, the common law form, and not an equitable one, must be pursued if the case is removed into a Federal Court.

Thompson v. Railroad Companies, 6 Wallace, 134.

Identically the same ground being involved in this controversy between the "Kirby Fraction" and the "Shoshone" claims, the action was not maintainable at all, in view of the

fact that another action was pending in the same Court to determine that question; but, under the peculiar, and we think irregular, practice of the Land Office, the application for patent for the "Kirby Fraction" claim having been allowed, appellant was compelled to institute suit in order to prevent the entry of the land upon that application, as hereinbefore more fully considered.

As to that portion of the "Kirby Fraction" claim adversed on behalf of the "Ibex," if the "Kirby Fraction" location is defeated in the first action as to the ground in controversy with the "Shoshone," it could not recover as against the "Ibex."

Gwillim v. Donnellan, 115 U. S., 45.

In this case the Shoshone Mining Co. is plaintiff in an action brought in support of an adverse claim, filed in the United States Land Office against the application for patent for the "Kirby Fraction" claim.

So far as the ground in conflict between the "Kirby Fraction" and "Shoshone" claims is concerned, all of the questions involved therein have already been presented; but I especially desire to call the Court's attention to the fact that the United States Land Office had no authority to permit an application for patent to be made by the "Kirby Fraction" for a portion of ground already applied for, and in litigation

before the Court. The law does not permit two suits to be brought and maintained at the same time in the same Court for the determination of the same question. The plaintiff in this second action was compelled, in order to avoid a default for want of an adverse, to proceed as though it had made no application for this ground and to bring its action in support of the adverse claim which it had been wrongfully compelled to file.

The facts and circumstances as to the location of the "Ibex" claim are substantially the same as those pertaining to the location of the "Shoshone." The only additional question which we are called upon to consider in this action is as to whether or not the right of the "Stemwinder" mining claim can in any way affect the validity of these discoveries.

It is shown by the plat herein that the ledge upon which the discovery of the "Shoshone" and "Ibex" claims was made, having its apex in the "Last Chance" claim, extends through the "Stemwinder," and it is contended that the "Stemwinder" would have the right to follow the ledge on its dip down to and including said discoveries. We reply to this that the "Stemwinder" mining claim, under no rule of law, can follow the ledge beyond the side lines, even admitting that it extended on its dip to the discoveries of the Shoshone Mining Company.

It is first necessary to have an accurate understanding as to the present shape of the "Stemwinder" mining claim. It is no longer a four-sided figure, as would appear from the plat. We offered in evidence at the trial the judgment of the District Court of the First Judicial District of Idaho, in and for Shoshone County, in the case of the Stemwinder Mining Company v. The Emma and Last Chance Consolidated Mining Company, brought in support of an adverse claim filed on behalf of the "Stemwinder" against the application of the "Emma" for a patent. By this judgment all of the land in conflict between the "Emma" and "Stemwinder," as shown by the plat, was awarded to the "Emma" and was adjudged never to have been a part of the "Stemwinder" mining claim. Again we offered in evidence a certified plat showing that the northwesterly point of the "Stemwinder," shown to overlap the "Last Chance," was patented to the "Last Chance," thus leaving the "Stemwinder" mining claim a six-sided figure. Now it is contended that the "Stemwinder" may follow the ledge on its dip to the westward, and counsel contended in argument that it might follow on the plane of its original end lines, and seemed to disregard the judgment that had been rendered as between the "Emma" and "Stemwinder;" but we must bear in mind that this judgment was affirmed by the Supreme Court of Idaho (2 Idaho, 421; 21 Pac., 1040), and affirmed by the Supreme Court of the United States, 149 U. S., 787,

and is conclusive as to the question of the lines of the "Stemwinder."

The question then arises, upon the plane of what lines could the "Stemwinder" follow the ledge, if it was so located that it might go beyond its side lines; would it be between its southerly end line and the southerly side line of the "Emma" projected, or would it be between its southerly end line and the southerly side lines of the "Last Chance?" These two propositions present different planes, and no parallel lines, intersecting the ledge.

But another serious objection to the granting of extra lateral rights to the "Stemwinder" interposes itself, and is based upon the rule established by the Trial Court and affirmed by the Circuit Court of Appeals, in the case of the Tyler Mining Co. v. Sweeny, which is, that in determining the direction in which the ledge may be followed on its dip, it is necessary to determine whether or not it is being followed more on its dip than on its strike. The course of the end line of the "Stemwinder" claim which intersects the ledge, is north 71 degrees and 50 minutes west. The course of the ledge, as shown upon the plat and as has been determined in all controversies where this question has arisen affecting this particular part of the ledge, is between north 45 degrees west and north 48 degrees west. Thus we see that the difference between the course of the ledge and the "Stemwinder" line, is

from 23 to 25 degrees, and is upward of 20 degrees more along than across the ledge. In fact, the right of the "Stem-winder" to follow on a plane drawn on its end line as claimed, would be practically to allow it to follow lengthwise along the ledge.

A diagram, Exhibit I herein, shows the surface lines and the course of the ledge through the several claims. The ledge line most favorable to the appellees, shown on this map or contended for, would be more across than along the "Stem-winder" claim, and would defeat any claim of that location to follow the ledge beyond its exterior lines under the rule established. It is only upon the dip of the ledge that the owner of the apex may follow down. The statute itself, in express terms, says (Revised Statutes of the United States, Sec. 2322), that the locator of a mining claim shall have the exclusive right of possession and enjoyment of "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their

own direction that such planes will intersect such exterior parts of such veins or ledges."

It is evident from the language of the statute, and from the language of this Court in the case of Iron Silver Mining Co. vs. Elgin, 118 U. S., 196, that it is the true dip of the ledge upon which the owner of a mining claim, having the apex, may follow down and that it is to be followed down and not along the surface. If the Stemwinder claim could follow along on this ledge near the surface, as it apparently would under the claim of the appellees, who would own that portion of the ledge lying southward of its south end-line?

The Trial Court, in disposing of this question, says (Trans. 32): "But it is also argued here that when those "planes are more along the course of than across the ledge, "that the ledge cannot be followed beyond the boundaries of "the claim. It is true, as suggested by counsel, that this Court "once instructed a jury (but with much doubt) that a ledge "could not be followed more on its course than on its dip, "and it does seem absurd, when the law says ledges may be "followed on their 'depths,' for the courts instead to say they "may be followed along their 'course.' But the Court of Ap- "peals did not by word affirm this instruction of this Court, "nor has that rule been supported by any court save a *nisi* "*prius* court in Utah Territory. It would seem that the only "logical conclusion of the holdings of the Courts that ledges

"must be followed between the planes of the lines they cross "is that they may be followed indefinitely between those planes "prolonged, for to say that when such following would be more "along the course than on the dip you must stop at the side "boundary line of the claim, is making a new law which Con- "gress never authorized. If there is any one right specially "granted by Congress it is to follow the ledge indefinitely on "its depths, which the miner has always claimed and done, "only he followed it on its dip, which, to some extent, the "Courts have unfortunately felt constrained, under their views "of the law, to modify."

The Trial Court was mistaken in asserting that the Circuit Court of Appeals did not affirm the instruction referred to.

The instruction referred to was given at both trials, and in considering it on the second appeal the Circuit Court of Appeals says:

"The question of the priority of the locations is not in- "volved in this case unless there was a controversy upon the "facts as to whether the lode in question, in its true course "lengthwise, passed through the ground of the Last Chance "claim at nearly right angles. This Court, in its former opin- "ion, in answering the contention of counsel on this point, ex- "pressed its views of the law in relation to the rights of the

"respective parties upon the theory that the lode in question, "in its true course lengthwise, crossed the side line of the Tyler "claim, and passed through the Last Chance claim at nearly "right angles. It is now claimed by the Tyler that the lode, "in its course lengthwise, does not cross the side lines of the "Last Chance at nearly right angles, as the dotted line of the "foot wall of the lode on the diagram might seem to indicate; "that the line, as thus drawn, followed the undulations of the "ground on the surface, but that the underground develop- "ments clearly show that the location of the Last Chance claim "was more along than across the lode. The testimony upon "this point is not contained in the record, and that question is "not properly before us for review; but there is a map, which "was made an exhibit in the case, which, upon this hearing, "is filed in this Court, on which are represented lines purport- "ing to be a true representation of the testimony of the vari- "ous witnesses as to the true course lengthwise of the lode "through the Tyler and Last Chance claims. From these lines "it appears that the location of the Last Chance was more "along than across the lode. If this correctly represents the "testimony that was given upon the trial, it was unnecessary "for the Court to instruct the jury as to the rights of the Last "Chance upon the theory that the lode, in its true course "lengthwise, crossed the side lines of the Last Chance at "nearly right angles. If the true course of the lode length-

"wise is more along than across the locations, then the mining "law, to which we will hereafter have occasion to refer, de- "termines the rights of the respective parties, independent of "the date of their locations. The right of each party to follow "the lode on its strike or true course lengthwise is terminated "at the point where the lode crosses the side line of the Tyler "and Last Chance locations; but each company would have "the right to follow the lode, the top or apex of which is with- "in its surface lines, on its dip, not upon its strike, upon a ver- "tical plane drawn downward parallel to the end line, at the "point where the strike of the lode ended; that is, at the point "where the lode, in its lengthwise course, intersects the side "lines of the claims. The Tyler would be entitled to all that "portion of the lode that lies westerly of such vertical line "drawn downward, and the Last Chance would be entitled to "all that portion of the lode easterly of said line. But the "Court gave instructions to the jury to the effect that if they "found from the evidence before them that the lode in its "course lengthwise crossed the side lines of the Last Chance "location at nearly right angles, and if they should also find, "from other evidence, that 'the Last Chance claim was the " 'older, your verdict should be for the Last Chance com- " 'pany; and, in this connection, I state to you that if you find " 'that the Tyler was the older location, and find that it was " following the ledge, as I have before explained to you, upon

" 'its dip, and not upon its course, then you should find for " 'the Tyler.' Under this instruction, we are, perhaps, bound "to assume that there was some evidence submitted to the "jury which tended to show a state of facts that might have "made it obligatory upon the jury to determine the question "as to the priority of the locations in order to arrive at a "proper verdict."

Last Chance Min. Co. v. Tyler Min. Co., 61 Fed Rep., 563.

The instruction in the "Last Chance" case was against us, and beyond a question was responsible for the adverse verdict in that case. That judgment was affirmed by the Appellate Court, and the question under discussion was fully considered, and, if we understand it correctly, the decision upon it was approved.

The rights of the "Stemwinder" mining claim are not being adjudicated in this action, but it was sought to interject the claims made on behalf of it, only for the purpose of confusing, and casting a doubt upon, the validity of the locations of the Shoshone Mining Company. The Court says (Trans. folio 69): "While I am inclined to think that the Stemwinder "and the other claims named have such extra-lateral rights as "will include this vein under the Shoshone, I do not think that "question can be determined in this case without further testi-"mony, but it may be said that if there is any portion of the

"ledge within the Shoshone, which is not covered by their "extra-lateral rights, it will belong to the Shoshone, if this "latter claim is not void as against the Kirby." We contend, however, that admitting, for the sake of argument, that the rights of the "Stemwinder" claim might be taken into consideration, nevertheless that claim has no extra-lateral rights, and could, under no circumstances, follow the ledge on its dip into the ground claimed as the "Shoshone" mining claim.

But no sufficient evidence was introduced upon which an adjudication of the rights of the "Stemwinder" claim could be had, and the Court so holds in determining this question. (Trans. pp. 47-59.)

This case must, then, turn largely upon the question involved in the first of the consolidated cases, but the Court made no separate findings of fact as to this case. Aside from those questions which are peculiarly applicable to it, we must depend upon the assignments and facts applicable to the first case, and draw our conclusions therefrom.

Because of the errors relied on we contend that the judgment in this case should be reversed with appropriate instructions to the Court below with reference to the questions of jurisdiction and of the errors relied upon.

Respectfully submitted,

W. B. HEYBURN,

LYTTLETON PRICE,

Counsel for Appellant.

MAR 30 1900

In the

# Supreme Court of the United States

OCTOBER TERM, 1899.

Filed March 30, 1900.

THE SHOSHONE MINING COMPANY,
Appellant,
vs.
ROYAL J. RUTHER and F. W. BRADLEY,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

## SUPPLEMENTAL BRIEF OF APPELLANT.

W. R. HEYBURN,
LYTTLETON PRICE,
Counsel for Appellant.

17,294.

# Supreme Court OF THE United States

## OCTOBER TERM, 1899.

## No. 208.

THE SHOSHONE MINING COMPANY,
Appellant,

vs.

ROYAL J. RUTTER AND F. W. BRADLEY,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

## SUPPLEMENTAL
# BRIEF OF APPELLANT.

Since filing appellant's brief in this cause, this Court in the case of William H. Blackburn, plaintiff in error, vs. The Portland Gold Mining Company and W. S. Stratton, No. 54, October term, 1899, did on January 8, 1900, render a decision covering the jurisdictional question involved in the case at bar; which we think disposes of the case on the third specification of error, page 15 of the appellant's brief,

which reads: "Because that it does not appear that the action is one arising under the constitution or laws of the United States or any treaty made under its authority." This is the first question discussed at page 35 of appellant's brief, and inasmuch as the contention in appellant's brief on this point is fully sustained by the recent decision of this Court above cited, we beg leave to submit this supplemental brief in order to direct the Court's attention to that decision.

It would seem apparent that the case must be dismissed for want of original jurisdiction in the United States Circuit Court, in which the suit was originally brought.

Respectfully submitted.

LYTTLETON PRICE,

W. B. HEYBURN,

*Counsel for Appellant.*